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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

J. E. HURLEY, CYRUS LELAND, JR., AND WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,
Appellants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY AND CHEROKEE AND PITTSBURG COAL & MINING CO.,
Appellees.

No. 95.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANTS' BRIEF.

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STATEMENT.

1. THE APPEAL.

This appeal (Rec. 113) seeks to reverse a decree (Rec. 129-130) of the Circuit Court of Appeals for the Eighth Circuit, upon an opinion (Rec. 122-129, 153 Fed. Rep., 503; 82 C. C. A. 453) by a divided court, in favor of certain intervenors, directing the District Court for the District of Kansas (in lieu of compelling an

election by trustees in bankruptcy whether to assume the performance of an alleged oral modification of written contracts of the bankrupt to deliver to a railway company certain quantities of coal being mined by the trustees or reject the same), to pay to one of the intervenors below, an appellee here, from a bankrupt estate certain sums of money as preferential demands, in a cause where no such claim was made, either by pleadings or proof, and where at the trial the right to such a preference was "expressly and positively disclaimed."

2. GENERAL FACTS.

(*a*) *The Bankruptcy Proceedings.*

Proceedings in involuntary bankruptcy were on July 7, 1905, instituted in the District Court of Kansas (Rec. 35), against the Mount Carmel Coal Company, herein called the Mount Carmel Company, a coal mining company, resulting in an adjudication (Rec. 5-6) upon September 26, 1905 (Rec. 117). Pending the adjudication receivers were appointed (Rec. 7, 22, 35), the same persons, appellants here, being thereafter elected as trustees (Rec. 20, 22, 72, 92, 117) of the bankrupt. These receivers and trustees, at least up to June 1, 1906, operated the coal mines of the bankrupt, desired possession of which was the gravamen of the complaint of the prevailing intervention, unless the court would compel the trustees to assume the performance of an alleged oral modification of an existing written contract of the bankrupt, they, denying the existence thereof, never having elected so to do.

(*b*) *Written contracts of bankrupt existing at the time of bankruptcy.*

The Atchison, Topeka & Santa Fe Railway Company, herein called the Railway Company; Osage Carbon Company, herein called the Osage Company, and the Cherokee & Pittsburg Coal & Mining Company, herein called the Cherokee Company, upon October 1, 1896, executed a written lease and agreement (Exhibit A, Rec. 37-57) with Charles J. Devlin, by the terms of which there

was leased to Devlin for three years certain coal mining properties in Kansas, owned by the Osage and Cherokee Companies, from which Devlin was, during the lease, to mine coal and at agreed prices furnish the Railway Company certain quantities therefrom. This lease was, upon March 1, 1897, assigned (Exhibit B, Rec. 58) to the Mount Carmel Company. Upon June 1, 1898 (Exhibit C, Rec. 58-63), and August 30, 1900 (Exhibit D, Rec. 63-67), the assigned contract was modified in certain unimportant particulars and extended to June 1, 1906. By these contracts, the Osage and Cherokee Companies, for certain rentals and royalties, leased to Devlin and his assign, the Mount Carmel Company, certain coal mining properties, which the lessee agreed to operate and from which, at agreed prices, payable on or before the 15th of each month, to supply daily to the Railway Company, which was to take same, all the coal it required in the operation of certain of its lines; in the event of the termination of the contract the fixed improvements made by the lessee were to be paid for by the Osage and Cherokee Companies; the Railway, the Osage and Cherokee companies could terminate the contract for any failure on the part of the lessee, who could likewise terminate the same for any failure on the part of either of the other parties, but neither could terminate the same unless the other failed after 30 days' written notice to cure the failure of performance. The Mount Carmel Company gave a bond of $100,000 with sureties satisfactory to the other parties to secure its faithful performance of the contract.

(*c*) *Order of court in reference to the contracts.*

At the time (Rec. 35) of the institution of bankruptcy proceedings, and the appointment (Rec. 35) of receivers and upon July 7, 1905, the District Court entered (Rec. 92) an order, which among other things, provided:

" * * * if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between the said Chero-

kee & Pittsburg Coal & Mining Company and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made. * * * indebtedness existing for the pay of wages due to workmen, clerks and servants, which have been earned within three months before the commencement of this proceeding, not to exceed three hundred dollars to each claimant, shall be paid in full by the receivers."

This referred alone to the *written* contract and not to any oral modification thereof, for neither the Cherokee or Osage Company was a party thereto.

(*d*) *Action of receivers.*

Neither the receivers nor trustees (Ev. Leland, Rec. 89; Reeves, Rec. 90, 92) nor the court (Rec. 110) knew of any contract other than those in writing, the alleged oral modification, to quote the language (Rec. 110) of the judge administering the trust, being "unknown to the receivers and the court at the time of their appointment." When the receivers were appointed there was about $79,000, practically a month's wages, due miners, payment of most of which was provided for (Rec. 87, 88) by receivers' certificates.

(*e*) *Intervening petition and result thereon.*

On November 20, 1905, the Railway Company filed (Rec. 70) an intervening petition (Rec. 33-36) claiming that the written contracts aforesaid had been orally modified by an agreement between it and the Mount Carmel Company (the Osage and Cherokee Companies not being parties thereto) by which the former, *prior* to the bankruptcy proceedings, advanced to the latter for pay-roll purposes sums aggregating $57,304.16, which were to be repaid by the latter by the delivery, at the written contract prices, of coal which it should *thereafter* mine. The relief sought was to compel the trustees either to assume the alleged oral modification and deliver to the Railway Company coal mined by *them* in payment of such advances, or else to deliver possession of the mining property. Neither Mr. Devlin, the president of the Mount Carmel Company,

nor Mr. Wilder, treasurer of the Railway Company, who it is claimed made the alleged oral agreement, was alive at the time of the trial. It appears, however, that the advances were, prior to the bankruptcy proceedings, made by the Railway Company, and in accordance with a long established practice, not to pay the employes but to pay existing debts to banks, to induce them to furnish money for the pay-rolls, the Railway Company charging interest on the advances. After hearing the evidence the referee in bankruptcy found (Rec. 107, 108, 109) and the trial judge approved the finding (*id.*), that no oral modification of the contract was made or ever intended to be made.

The Circuit Court of Appeals in an opinion (Rec. 122-129) of Judge Adams (Judge Sanborn concurring and Judge Hook dissenting), held that because at the time the advances were made the Railway and Mount Carmel Companies understood and agreed that the bankrupt would repay the money with coal it should mine in the future; there was an equitable assignment of the coal to be thereafter mined, which the trustees accepted by using the property, and since at the time of that decision the leases had expired and the property surrendered, the Railway Company should have its claim paid as one preferential in its nature; this though the trial judge in his opinion (Rec. 107), without exception thereto, stated that intervenors "expressly and positively disclaimed" "any and all right * * * to preferential payment." From this action this appeal is prosecuted.

3. CASE IN DETAIL.

(*a*) *Intervening petition.*

The Railway, Osage and Cherokee Companies upon November 20, 1905, filed (Rec. 70) a joint intervening petition in which they alleged:

First—The execution by intervenors and the Mount Carmel Company of the written contracts aforesaid.

Second—Afterwards, the Mount Carmel Company represented

to the Railway Company it was impossible to pay off the miners, unless it would advance the money for the purpose, whereupon these *two companies only* orally agreed that the existing written contracts (Exhibits A, B, C and D) between the four companies should be modified to the extent that the Railway Company should advance the money for the pay-rolls, and the Mount Carmel Company should deliver to it in July and August, 1905, sufficient coal at the contract price to repay the advances. Upon account of the advances, after allowing credits there was due (Exhibit E, Rec. 68-70) upon September 27, 1905, $57,304.16.

Third—Upon July 7, 1905, receivers were appointed for the mining property in bankruptcy proceedings against the Mount Carmel Company upon account of which coal was not delivered in payment of the advances, by reason of which the Railway, Osage and Cherokee Companies were entitled to declare the leases forfeited, and are entitled to the property, unless the receivers be directed to assume and perform the contract as orally modified by delivery to the Railway Company coal in a sufficient amount to collect the indebtedness, wherefore, intervenors prayed that the receivers either deliver to the Railway Company coal in sufficient quantity to pay the debt, or else make to the lessors redelivery of the mining property under the terms of the lease.

(*b*) *Answer to intervening petition.*

The amended answer (Rec. 72) of the trustees in bankruptcy denied each allegation of the petition, and that the alleged verbal contract, even if made, was any modification of the written, contract and also averred that if made, it was violative of the Kansas Statute of Frauds providing that all contracts for interests in land to be valid must be in writing.

(*c*) *Evidence before referee.*

The matter was heard before Hon. N. H. Loomis, then referee in bankruptcy, the following evidence being offered:

It was (Rec. 72) admitted that the intervening petition might be amended by naming the trustees in bankruptcy as the successor

to the receivers who were in possession when the petition was filed, and that Exhibits A to F attached to the petition were correct copies of the original written contracts.

A. O. Wellman (Abs. 72-86) testified: The items of the account (Exhibit E) were correct; C. J. Devlin, president of the Mount Carmel Company, for a long period of time, had been in the habit of obtaining advances from the Railway Company which he said were for pay-roll purposes to be paid for out of coal furnished by it in the future under the contract; upon these advances interest was charged; Devlin would state that he had borrowed from banks to meet his pay-roll, and when the note became due he would represent he could not raise the money for the pay-roll, unless he could pay these notes off, and the Railway Company accordingly made the advances, Devlin stating that payment would be made in coal mined in the future under and at the prices fixed in the contracts. Both Devlin and Mr. Wilder, treasurer of the Railway Company, between whom the alleged arrangement was made, were dead; no certain fixed or definite arrangement as alleged was testified to.

Cyrus Leland, Jr., (Rec. 86-89) one of the receivers and trustees, testified: While he had never read the *written* contracts, he knew of their existence; the pay-rolls of the mines were about $80,000 per month; upon taking charge the receivers had to borrow $50,000 to meet the pay-roll for the last half of June, 1905; since then the Railway Company advanced money for every pay day, but were furnished coal in amounts in excess thereof; the receivers and trustees never knew that there had been any *verbal* modification of the written contracts and never undertook or intended to carry out same.

Walter Reeves, (Rec. 89-92) another of the receivers and trutsees, testified that he never before the trial heard of the alleged verbal contract.

An order (Rec. 92) in the bankruptcy proceedings, July 7,

1905, was offered, it providing as already stated (*Infra* Div. 2, c), for the operation of the mines by the trustees.

W. H. Rossington (Rec. 93-95) by affidavit, admitted as a deposition, testified: In June, 1905, C. J. Devlin was stricken with illness and incapacitated from transacting business; about June 20, 1905, he and Geo. R. Peck conferred with Mr. Norton, the manager of the Mount Carmel Company, about the necessity and means of raising money to meet pay-rolls; Peck suggested that the Railway Company advance the money; Norton said that the last two months' accounts had been hypothecated for the purpose, and coal that was to be furnished was still in arrears; Norton afterwards said that the Railway Company had subsequently agreed to advance this money and did so to the amount of $41,000 or $43,000. Written objections (Rec. 96-98) to most of this testimony as hearsay were, by the trustees, made, and by the referee overruled (Rec. 109).

(*d*) *Referee's report and order.*

The referee upon January 27, 1906, (Rec. 100-107) reported that the agreement under which the advances were made was a separate undertaking (to which the Osage and Cherokee Companies were not parties) not entering into or forming a part of or any modification of the written contracts, nor so intended by either party; the advances were consistent with the written contracts and were made in accordance with a practice which had been, for a considerable time, followed.

Upon this report (Rep. 100-108) there was by the referee entered an order (Rec. 98) denying the petition of intervention.

(*e*) *Petition for review.*

Petitioner filed a petition for review (Rec. 221-24), but never even claimed or asserted therein any claim for a preference.

(*f*) *Opinion and order of District Court.*

The District Court, on March 5, 1906, upon an opinion (Rec. 100-112) of Judge Pollock, who was administering the property,

entered an order (Rec. 99) confirming and approving the findings and report of the referee.

This opinion held:

(1) Intervenor in oral and written arguments expressly disclaimed any claim of subrogation to the rights of the miners, whose claims were paid and *any preference over the other creditors,* the report (Rec. 107) in this respect reciting:

"At the oral argument and in the written briefs filed on behalf of the petitioners any and all claims of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railroad Company is disclaimed by the petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

(2) The referee was right in holding that the evidence showed that there was never any modification of, nor intention to modify the written contracts; nothing more could be claimed than that the debtor promised to pay a general creditor out of specific funds which might be created and be in its *own* hands in the future; neither the court nor the receivers ever knew of any verbal modification of the written contracts and neither ever intended to adopt any such modified contract; had the written lease made provision for the payment to the Railway Company out of coal to be mined in the future, a violation of the covenant would have given no right to the lessors to forfeit the lease or retake the property, nor the Railway Company any right to any preference.

(g) *Appeal and result thereof.*

An appeal (Rec. 112, 113) was upon March 12, 1906, prayed for and allowed to the Circuit Court of Appeals, not one of the ten assigned errors (Rec. 114, 115) claiming a preference, the nearest thereto being that the receivers should be required to deliver to it coal to the amount of its advances.

Although the Circuit Court of Appeals held its regular May and September, 1906, terms, no attempt was made to advance

the cause, and it was not until December 10, 1906, (Rec. 121-129) that the cause was argued. An opinion was handed down (Rec. 121-129) March 20, 1907, by Judge Adams (Judge Sanborn concurring and Judge Hook dissenting) to the effect:

First—As the Railway Company made the advances upon the promises of the Coal Company to repay same out of coal from mines in its possession to be mined by it in the future, this was an equitable assignment of the coal when it came into existence.

Second—The written contracts were modified by a parol contract to pay for advances with coal subsequently mined, and hence when the trustees continued in possession, they, as a matter of law, adopted the contract *as thus modified*, so that the equitable assignment became binding upon the trustees, and they thereby became obligated to pay the debt of the bankrupt in coal mined by them.

Third—Since at the time of the decision the lease had expired so that the debt could not be then paid in coal the cause was reversed and the court below directed to establish the demand as one preferential in its nature, though at the trial below a right to a preference was (Rec. 107) positively disclaimed, and no such right was ever claimed.

(*h*) *Appeal here.*

The decision of the Circuit Court of Appeals not being regarded as final, an appeal was (Rec. 130) allowed to this court, where a motion has been filed to dismiss because a finding of fact was not made under clause 3 of General Order XXXVI, adopted by virtue of Section 25*b* of the Bankruptcy Act, and because the case was not appealable under Section 25*a*, subdivisions 1 and 2, for that the question involved is not one which might have been taken on appeal from the highest court of a state, and no certificate was given by a justice of this court. This motion is to be presented with the merits of the case.

APPELLANT'S ARGUMENT.

I.

Motion to Dismiss.

(1) The Motion.

Appellees have filed a motion to dismiss based upon the grounds: (a) No finding of fact was made by the Circuit Court of Appeals. (b) The case was not appealable under Section 25*a*.

(2) The Case.

To properly appreciate the record it is necessary to keep in mind several features of the case.

(a) Certain coal mines were in the custody of and being operated by receivers and trustees in bankruptcy as lessees so that possession thereof could only be obtained by intervention in the bankruptcy proceeding, or by independent suit by leave of that court (*Barton* v. *Barbour*, 104 U. S. 126, 36 L. Ed. 672; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689). Such an intervention or suit would be based upon the fact that the property was in the custody of the bankrupt court, so that it could be maintained independently of diverse citizenship.

(b) No claim for a debt was presented for allowance. The facts alleged were that the Railway and Mount Carmel Companies alone orally agreed to modify that portion of the written contracts to which they with the Osage and Cherokee Companies were parties, by a proviso that the Railway Company would make certain advances to the Mount Carmel Company which would by the latter be paid for in coal to be by the latter mined in the future from mines in its own possession. Although neither lessor

had any interest in this question, and neither was a party to the alleged modification, both joined with the Railway Company in the intervention, and the prayer (Rec. 35) was:

"That J. E. Hurley, Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, the Osage Carbon Company and the Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract."

It is therefore plain the only thing *sought* was to compel the trustees to elect to assume the alleged *oral* modification and deliver to the Railway Company certain quantities of coal, or else to deliver to the lessors the coal mines being operated by the receivers and trustees. In either alternative the action was in substance one to recover property (either coal or the mines) in the custody of the District Court, there being no attempt to establish any debt, nor to assert any right given under the Bankrupt Act.

(c) Not only was there no effort to prove a debt, but the right to any preference or lien was expressly disclaimed. The trial judge expressly (Rec. 107) said:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railway Company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

This statement was in no wise challenged, and neither by exceptions or assignments of error (Rec. 114-116) upon appeal was any claim of a preference or the right to the allowance of a debt presented, so that it was not to be expected that any party would prepare or request findings of fact or conclusions of law. When the Circuit Court of Appeals, contrary to the claims of the parties, regardless of the pleadings, and in the face of a disclaimer of a preference, decided that since the term of the lease had expired, a preferential claim would be established, it was too late to obtain a findings of fact or conclusions of law. This because paragraph 3 of the General Order XXXVI in Bankruptcy limited the making of same by the court to "at or before the time of entering its judgment or decree." So when the Circuit Court of Appeals *first* discovered the right to a preference it was too late to obtain findings of fact, a very good reason for not now dismissing the appeal because of a want thereof.

With these considerations in mind we now deal with the question of the right of appeal, first considering whether there was the right of appeal to this court irrespective of the Bankrupt Act.

(3) RIGHT OF APPEAL IRRESPECTIVE OF THE BANKRUPT ACT.

(a) Section 6 of the Act of March 3, 1891, (26 Stat. L. 828; 4 Fed. Sts. Ann. 409) creating the Circuit Court of Appeals, provides:

" * * * the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and admiralty cases. * * * In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of

error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

The jurisdiction in this case, which sought to recover property in the custody of the United States, was not dependent upon the citizenship or alienage of the parties either to the intervention or to the original cause, it did not arise under any patent, revenue or criminal law, nor was it an admiralty case. It was therefore a case "not hereinbefore in this section made final" and hence clearly appealable to this court.

So this court has repeatedly applied the principle holding that the decision of the United States Circuit Court of Appeals was not final in suits upon a bond of the Circuit Clerk (*Howard* v. *U. S.*, 184 U. S. 676, 46 L. Ed. 754) or United States Marshal (*Sonnetheil* v. *Brewing Co.*, 172 U. S. 401, 43 L. Ed. 492), against railroad corporations organized under an Act of Congress (*Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526, 47 L. Ed. 575; *U. P. R. Co.* v. *Harris*, 158 U. S. 326, 39 L. Ed. 1003), between a foreign state and a citizen of this country (*Republic of Columbia* v. *Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159), infringement of trade marks (*Werner* v. *Searle*, 191 U. S. 195), recovery of revenue taxes paid under protest (*Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 48 L. D. 496), invoking jurisdiction both because of diverse citizenship and of a federal question (*Mississippi River Commission* v. *Ill. Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209), against receiver of a National Bank (*Auten* v. *U. S.*, 174 U. S. 125, 43 L. Ed. 920), by the government to cancel patent (*U. S.* v. *Amer. Bell Telephone Co.*, 159 U. S. 548, 40 L. Ed. 255).

Whenever a question has been in an intervention in a receivership case, the test as to whether the decision of the Circuit Court of Appeals is final, is the ground of jurisdiction of the original cause in which the receiver is appointed (*Pope* v. *L. & N. R. Co.*, 173 U. S. 573, 43 L. Ed. 814; *Rouse* v. *Hornsby*, 161 U. S. 588, 40 L. Ed. 817; *Carey* v. *Houston & T. C. R. Co.*, 161 U. S.

115, 40 L. Ed., 638). Tested by this rule the original jurisdiction in the bankruptcy case arose under the bankruptcy law and not by virtue of any exceptions named in the act of 1891. The intervention was because the property sought to be recovered was actually in the custody of the District Court.

(b) All cases wherein the decision of the Circuit Court of Appeals is not made final by the Act of March 3, 1891, are by virtue thereof still appealable though they arose in bankruptcy proceedings.

Hewit v. *Berlin Machine Works*, 194 U. S. 296, 300, 48 L. Ed. 986, 987, 988, was a successful intervention in a bankruptcy proceeding asserting title to property in the hands of the trustee in which the trustee, just as intervenors did here (Rec. 112, 113), took to the Circuit Court of Appeals by *general* appeal instead upon petition for supervision and revision under Section 24*b* of the Bankrupt Act. In sustaining an appeal from the Circuit Court of Appeals, Mr. Chief Justice Fuller said:

"If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under Sec. 24*b* of the Bankruptcy Law (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), the case would have fallen within *Holden* v. *Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under Sec. 24*a*, exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required. (*Holden* v. *Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45), while Sec. 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by Sec. 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson* v. *Otis*, 190 U. S. 552, 47 L. Ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh* v. *Foreman*, 125 Fed. 217.

The appeal to this court then followed, under Sec. 6 of the Act of March 3, 1891, (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550)."

In *First National Bank* v. *Klug*, 186 U. S. 203, 205, 46 L. Ed. 1127, 1128, Mr. Chief Justice Fuller said:

"Apart from Sec. 25, the Circuit Courts of Appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings, and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on *certiorari*, or in certain cases by appeal, under Sec. 6 of the Act of 1891."

Huntington v. *Saunders*, 163 U. S., 319, 320, 41 L. Ed., 174, 175, was an appeal from the Circuit Court of Appeals in denying a creditor's objection to the discharge of a bankrupt. Mr. Chief Justice Fuller said:

"From the final decree of the Circuit Court of Appeals Huntington prayed an appeal to this court, which was allowed, and having been docketed here, a motion to dismiss was made.

This appeal is prosecuted under the last clause of Sec. 6 of the judiciary act of March 3, 1891, providing: 'In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs.' This is not one of the cases in which the decrees or judgments of the Circuit Courts of Appeals are made final by that section, but in our opinion the matter in controversy does not exceed $1,000 besides costs."

In *Elliott* v. *Toeppner*, 187 U. S., 327, 334, 47 L. Ed., 200, 203, Mr. Chief Justice Fuller said:

"In *Bardes* v. *First National Bank*, 175 U. S., 526, 44 L. Ed., 261, 20 Sup. Ct. Rep., 196, we held that the 5th and 6th sections of the judiciary act of March 3, 1891 (26 Stat. at L. 827, 828, Chap. 517, U. S. Comp. Stat., 1901, p. 549, 550), were not changed by the bankruptcy act. The 6th section gives the courts of appeals jurisdiction to review by appeal or writ of error final decisions in the District and Circuit Courts in cases other than those provided for in the 5th section."

It is therefore plain that the judgment of the Circuit Court of Appeals was not final and this cause was appealable to this

court regardless of any of the provisions of the bankrupt law.

(4) THE APPEAL NOT BEING UNDER SECTION 25*b*, THE LIMITATIONS OF PARAGRAPHS 1 AND 2 OF SUBDIVISION b, ARE NOT APPLICABLE.

(a) Section 25 of the Bankrupt Act provides:

"Sec. 25. *Appeals and Writs of Error.*—(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts of Appeals of the United States, and to the Supreme Court of the Territory, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) *from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.* Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

(b) From any final decision of a court of appeals, *allowing or rejecting a claim under this act*, an appeal may be had under such rule and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of the state to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States. * * *"

The points are now made that the case is not one where the case might have been taken from the highest court of the state, and there was no certificate made by a justice of this court.

(b) The appeals provided for by this section only relate to the particular steps therein specifically enumerated. Thus, in *Hewit v. Berlin Machine Works*, 194 U. S., 296, 300, 48 L. Ed., 986, 987, Mr. Chief Justice Fuller observed:

"Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required * * *"

Therefore, since this appeal is not as to anything in section 25 enumerated, there is nothing in the motion to dismiss so far as it is based upon a noncompliance with that section. All the questions presented could be safely left here. There are, however, other suggestions equally fatal.

(5) General Order XXXVI has no Application to an Appeal Under the Act of 1891.

(a) General Order XXXVI reads:

"1. Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided for in this act, by the rules governing appeals in equity in the courts of the United States.

2. *Appeals under the act* to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party *is entitled by the act* to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

(b) The power to adopt the order was derived from subdivision b of section 25 of the Bankrupt Act which provides that "and may be had under such rule * * * as may be prescribed by the Supreme Court. * * *"

From this it is to be observed that the "rules" to be made, so far as concerns this case, relate only to appeals from a "final decision *allowing or rejecting a claim under this act*" so that Gen-

eral Order XXXVI is likewise so limited. Hence, if the decree below was not *"one allowing or rejecting a claim under the act,"* then such general order has no application to this case. These words have reference to those previously used in subdivision 2, section 2, giving jurisdiction to "allow or disallow" claims and in subdivision 3 of section 25 allowing an appeal "from a judgment allowing or rejecting a debt or claim of five hundred dollars." Unless the demand presented came within this definition then General Order XXXVI has no application. That it does not is plain. The claim *presented* was for property. No effort was made to establish a debt and incidentally thereto a preference, for all claim of preference was (Rec., 107) expressly disclaimed. The whole theory of the intervention was to compel the trustees to assume or reject the alleged oral modification of the written contract.

In Re Whitener, 44 C. C. A., 434, 105 Fed. Rep., 180, 186, 187, is much in point. It was there decided that a decree awarding to an intervenor property in the hands of a trustee, was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Judge Pardee said:

"The question presented on the motion to dismiss is whether this judgment of restitution is a judgment allowing or rejecting a debt or claim of $500 or over. It is not contended that it is a debt, but it is contended that it is a claim, within the meaning of the statute. The word "claim," as used in the above connection—"debt or claim of $500 or over" —seems to mean a moneyed demand, the same as "debt," and was used not to enlarge, but to render certain. The word "debt," as defined in the first section of the statute, includes any debt, demand, or claim provable in bankruptcy. The word "claim," although frequently used in the bankruptcy act, is not specifically defined; but section 57 of the act is entitled, "The Proof and Allowance of Claims," and the word as therein used in every instance refers to, and means only, a moneyed demand. Paragraph "k" of the section is to the effect that claims which have been allowed may be reconsidered for cause, and reallowed or rejected, in whole or in part, according to the equities of the case, before, but not after, the estate has been closed. To give the word "claim" the broad meaning contended for would be to prac-

tically enlarge the statute so as to give the right of appeal in every disputed claim involving $500 or over occurring in the administration of the bankrupt's estate; for all contests therein, including questions of discharge of the bankrupt and selling property, can easily be shown to be claims within the broad meaning of the word "claim,"—a demand or supposed right. The proceeding in the court below was a proceeding in the administration of the bankrupt's estate, and was in no proper sense a proceeding to allow or reject a debt or claim against the bankrupt's estate. * * *"

Chapman v. *Bowen*, 207 U. S., 89, relied upon by appellees, lends no aid to this question because that was a case where a debt was presented for allowance and duly allowed, and the appeal was only by virtue of section 25 and not under the act of 1891.

(b) But if there was an *allowance* of a claim under sections 2 and 25, there was as already seen no appeal under section 25 The appeal was under the Act of 1891. Now General Order XXXVI, made under and by virtue of section 25, only applies to a "case in which either party is entitled *by the act* to take an appeal to the Supreme Court." So all the limitations of subdivision b of section 25 are restrictions upon the right of appeal given by the section. An appeal under the Act of 1891 is free therefrom. It has already been shown that an appeal lies under that act, wholly irrespective of the Bankrupt Act. Hence General Order XXXVI has no application. *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, 300, 48 L. Ed., 986, 987, is conclusive upon this subject.

We proceed then to consider the merits of the case.

II.

Inasmuch as the fund out of which the advances were to be repaid remained in the bankrupt's custody, no equitable assignment was made, or equitable charge created, hence upon no theory could the intervenors prevail.

(1) VIEW OF THE CIRCUIT COURT OF APPEALS.

The majority opinion (Rec., 125) of the Circuit Court of Appeals is bottomed upon the proposition that the alleged verbal modification operated as an equitable charge upon the coal when subsequently mined, for Judge Adams said:

"We would think the inevitable meaning of the new arrangement interpreted in the light of the conditions surrounding the parties and as necessarily intended by them was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it is creating an equitable charge or lien, however inartificially it may have been expressed."

(2) THE PLEADINGS, EVIDENCE, REFEREE'S REPORT, FINDING OF THE TRIAL JUDGE AND OPINION OF THE CIRCUIT COURT OF APPEALS ALL SHOW THAT THE ALLEGED PAYMENT WAS EXPECTED TO BE MADE FROM A FUND IN THE CUSTODY OF THE DEBTOR.

The intervening petition (Rec., 34) concedes that the custody of the property was to be at all times in the Mount Carmel Company, by reciting:

"That afterwards said Mount Carmel Coal Company, by its president, Charles J. Devlin, duly authorized, represented to the Atchison, Topeka & Santa Fe Railway Company that it was impossible for said Mount Carmel Coal Mining Company to pay off the laborers engaged in mining coal by said Mount Carmel Coal Company upon the lands described in the leases and contracts hereinbefore referred to, unless the Atchison, Topeka & Santa Fe Railway Company would advance to said Mount Carmel Coal Company enough moneys to enable the said Mount Carmel Coal Company to pay the laborers engaged in operating said mines. And it was thereupon agreed between the said Mount Carmel Coal Company and the said The Atchison, Topeka & Santa Fe Railway Company that the contracts and extensions thereof, hereinbefore

referred to, should be modified to the extent that the said railway company should advance the necessary moneys to pay off the laborers and keep said mines in operation and for the moneys so advanced the said Mount Carmel Coal Company should deliver to the said The Atchison, Topeka & Santa Fe Railway Company, during the months of July, 1905, and August, 1905, a sufficient amount of coal at the prices provided for in the contracts hereinbefore referred to to fully cancel and liquidate the indebtedness thereby created."

Indeed, the whole basis of the claim is that the debtor was to mine the coal from mines in its possession, and deliver the same in payment of the advances.

As already seen, the position taken (Rec., 107) by intervenors in the District Court and adopted (Rec., 124, 125) by the Circuit Court of Appeals, was that the bankrupt "agreed to mine and deliver to the railway company" coal from the mines in its possession.

(3) THERE WAS NO ASSIGNMENT IF THE PAYMENT WAS TO BE FROM FUND IN HANDS OF THE DEBTOR.

To support this conclusion Judge Adams relied upon *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 41, L. Ed., 855 (some cases of a like character being cited), where it was held that an equitable assignment could be adjudged when advances were made upon a clearly expressed agreement to pay same out of a specific fund in the hands of a third party.

The whole foundation for the opinion disappears when the fact is remembered that here the repayment was to be by the debtor out of property in his own hands. The cases make this plain. Thus, in *Christmas* v. *Russell*, 14 Wal., 69, 84, 20 L. Ed., 762, 764, the debtor absolutely and unconditionally agreed to pay a creditor with or out of the proceeds of a note in his own possession. Mr. Justice Swayne said:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect, the phraseology employed is not material provided the intent to transfer is mani-

fested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. * * *"

In *Dillon* v. *Barnard,* 21 Wal., 430, 440, 22 L. Ed., 673, 677, it appeared that a railroad company agreed to pay its construction contractor out of the proceeds realized by it from a sale of its bonds. In denying an equitable lien Mr. Justice Field said:

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials furnished. There must be a relinquishment, by the employer, of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to the payment when his contract is completed. *Rogers* v. *Hosack,* 18 Wend., 319; *Dickenson* v. *Phillips,* 1 Barb., 454; *Hoyt* v. *Story,* 3 Barb., 262; *Hall* v. *Johnson,* 20 Pick., 197; *Christmas* v. *Griswold,* 8 Ohio St., 558; *Christmas* v. *Russell,* 14 Wall., 70 (81 U. S., XX, 762); *Malcolm* v. *Scott,* 3 Hare, 46. * * *"

In *Meyer* v. *Delaware Railroad Construction Company,* 100 U. S., 457, 477, 25 L. Ed., 593, 600, 601, a railroad company agreed to pay its construction contractor out of funds collected by it from municipal aid, voted in aid of construction. In denying an equitable charge Mr. Chief Justice Waite said:

"It is contended that the words, 'All the money for the work hereinbefore specified to be paid by the citizens of Delaware county,' which appear above the signature of the president of the railroad company to the contract, give the construction company collateral security, and thus vitiate the lien. We cannot so interpret the contract. In the body of the instrument the obligation of the railroad company, to pay, is absolute and unconditional. The

additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware county. No control is given the construction company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware county to discharge its obligations under the contract, and a corresponding obligation on the part of the construction company to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment. In *Christmas* v. *Russell*, 14 Wall., 69 (81 U. S., XX, 762), we said: 'An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee.' It seems to us that this is conclusive of the present case. The railroad company has nowhere by its agreement given the construction company any power to collect. * * *"

In *Ex Parte Tremont Nail Co.*, 24 Fed. Cas., 183, 184, No. 14168, it was, just as here, sought in bankruptcy to establish an equitable lien in favor of a creditor because the debt was created by the promise to pay same out of the first money received from a customer for whom a large order was being filled. This case is so precisely in point that we quote extensively what Judge Lowell said:

"The parties have acted throughout in the utmost good faith, and there is a strong moral equity, so to call it, for the petitioners: but the question is whether they had what, in equity as admitted in the courts, amounts to an assignment of part of the debt due from Dunn. A learned judge has said that the law of equitable assignments is brought to such an exquisite degree of refinement that it is by no means easy to understand it. *Field* v. *Megaw*, L. R., 4 C. P., 660, per Brett, J. And another judge, in a case which, in one aspect, resembles the one at bar, said that the lien might depend on whether the word used was 'will' or 'shall,' in an oral agreement collateral to a negotiable instrument. *Thomson* v. *Simpson*, 5 Ch. App., 659. In the case first above cited, the decision was that a promise to pay when a certain debt is received is not an equitable assignment of the debt. Two of the judges in that case intimate that a promise to pay out of a particular debt, or fund, would work a transfer. A like dictum was made by

Lord Truro, in *Rodick* v. *Gandell*, 1 De Gex, M. & G., 763, and this was followed by a decision of a learned vice-chancellor, afterwards lord chancellor, founding himself solely on this dictum (*Kiccard* v. *Prichard*, 1 Kay & J., 277); but he overruled the decision of a very eminent chancellor to the contrary (Bradley's Case, Ridg., t. Hard., 194). The refinement appears in this: that while an agreement to pay out of a fund is one the border line, it is held both in England and in the United States, that any order or assignment, oral or written, to pay out of a particular fund, made upon the debtor or holder of the fund, or an agreement to give such an order, or a mere oral direction to go and receive the money and pay such and such debts with it, does operate as an equitable assignment. See *Diplock* v. *Hammond*, 2 Smale & G., 141, affirmed 5 De Gex, M. & G., 320; *Gurnell* v. *Gardner*, 4 Giff., 626; *Hunt* v. *Mortimer*, 10 Barn. & C., 44; *ex parte Carlon*, 4 Deac. & C., 120; *Bank of U. S.* v. *Huth*, 4 B. Mon., 423; *Newby* v. *Hill*, 2 Metc., (Ky.) 530; *Richardson* v. *Rust*, 9 Paige, 243. In the United States, it was held many years ago that a mere promise to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, would not work an equitable assignment. *Rogers* v. *Hosack*, 18 Wend., 319. This case was remarked upon by the chancellor in *Richardson* v. *Rust*, 9 Paige, 243; but it has been followed in all the cases which I have seen, and appears to be the settled law of this country. See *Hoyt* v. *Story*, 3 Barb., 262; *Christmas* v. *Russell*, 14 Wall. (81 U. S.), 69; *Tris'* v. *Child*, 21 Wall. (88 U. S.), 441, per Swayne, J.; *Christmas* v. *Griscold*, 8 Ohio St., 558; *Connely* v. *Harrison*, 16 La. Ann., 41; *Eib* v. *Martin*, 5 Leigh, 132; *Ford* v. *Garner*, 15 Ind., 298; *Pearce* v. *Roberts*, 27 Mo., 179.

With these cases before me, I cannot hold that the agreement between these parties gave any lien or charge on Dunn's debt in favor of these petitioners, and their petition to stand as privileged creditors is denied. * * *"

The doctrine now contended for has been repeatedly reaffirmed in the federal courts. (*Putnam Savings Bank* v. *Beal*, 54 Fed. Rep., 579; *Badgerow* v. *Manhattan Co.*, 74 Fed. Rep., 926; *Commercial Bank* v. *Rufe*, 92 Fed. Rep., 795.)

In *Hale* v. *Dressen*, 76 Minn., 183; 78 N. W., 1045, 1046, an investment company agreed to pay a debt out of rents which it would in the future collect from its own property. Chief Justice Start said:

"Its promise to pay interest from the rents was only its personal executory agreement to pay a part of what it was legally bound to pay; for the promise of a debtor to pay his creditor, out of a designated fund, of which he retains control, when the same is received by him, is a personal agreement only, and cannot be construed either as an equitable assignment or a lien on the fund. *Cordage Co.* v. *Seymour*, 67 Minn., 315, 69 N. W., 1079; *Rogers* v. *Hosack's Ex'rs.*, 18 Wend., 319; *Christmas* v. *Russell*, 14 Wall., 69. * * *"

Fairbanks v. *Welshans*, 55 Neb., 385, 75 N. W., 865, 873, was a somewhat similar case, Ragan, C., saying:

"In the case at bar Morse & Company do not claim that they have any legal lien upon the assets of this co-partnership of Welshans & Company, but they do claim that they have an equitable lien upon these assets because of the provisions of the contract under which they sold the boilers. They base this claim of an equitable lien upon these assets upon the provisions of the contract in and by which Welshans & Company agreed that Morse & Company should be paid for the boilers as soon as they were set in place and accepted by the United States, and paid for out of the moneys coming to Welshans & Company from the United States on the contract for the improvement in which said boilers were used. The petition does not allege that the agreement between Morse & Company and Welshans & Company not only provided that Morse & Company should be paid for their boilers out of the money coming on the contract with the United States, but that they should have a lien upon the proceeds of that contract. But it is obvious that this is the pleader's legal conclusion of the effect of and not the actual contract between the parties. But an agreement of the debtor to pay his creditor's claim out of the moneys received from a particular fund, but which gives the creditor no present right in or control over the fund, save through the debtor, and looks to the future acts of the debtor to render the fund available, does not operate as an equitable assignment of the fund to the creditor. *Christmas* v. *Griswold*, 8 Ohio St., 558; *Ford* v. *Garner*, 15 Ind., 298; *Pearce* v. *Roberts*, 27 Mo., 179; *German Nat. Bank* v. *First Nat. Bank*, 53 Neb., ——, 75 N. W., 531. In *Christmas* v. *Russell*, 14 Wall., 69, the rule is stated in this language: 'A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise.

If the holder of the fund retain control over it, as ex gr. power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment.' The averments of Morse & Company's petition fall far short of bringing them within the doctrine of an equitable assignment. No part of the moneys due from the United States was set aside for the payment of Morse & Company's claim. Notwithstanding the promise made by Welshans & Company to pay Morse & Company's claim out of the moneys which might be paid them by the United States, as soon as the boilers were accepted and put in place, Welshans & Company at no time parted with their control and right of disposition of the money coming from the United States; nor did they, by an order or otherwise, invest Morse & Company with the authority to receive or collect these moneys or any part of them."

In *Hicks* v. *Roanoke Brick Co.*, 94 Va., 746, 27 S. E. Rep., 596, a sewer contractor agreed to pay for the brick used out of payments for the work received from the city. Judge Riely said:

"But a mere promise or agreement to pay a debt out of a designated fund, when received, does not give an equitable lien upon the fund, or operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment, there must be an assignment or transfer of the fund, or some definite portion of it, so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer. 3 Pom. Eq. Jur., Sec. 1280; 1 Jones, Liens (2nd Ed.), Secs. 48, 50, 52; *Rodick* v. *Gandall*, 1 De Gex. M. & G., 763; *Clayton* v. *Fawcett's Admrs.*, 2 Leigh, 19; *Eib* v. *Martin*, 5 Leigh, 132; *Christmas* v. *Russell*, 14 Wall., 69; and *Trist* v. *Child*, 21 Wall., 441.

Patterson gave no order to the brick company on the city of Roanoke, which was to become his debtor for the construction of the sewers, for the latter to pay to the former for the brick it furnished to him. He did not assign or transfer to it for such purpose any part of the fund thus to become due to him. The agreement upon which it relies for the creation of an equitable lien in its favor is a mere promise by the Fidelity Loan & Trust Company to pay when and as it collected from the city the money it would owe Patterson. This did not operate as an equitable assignment. It gave to the brick company no control of the fund, and the company acquired no lien on it. * * *"

In *Hossack* v. *Graham*, 20 Wash., 192, 55 Pac. Rep., 36, 37,

in denying a claim of an equitable assignment under agreement to set aside for a debt 25 per cent of the proceeds of the sales of certain lots, Judge Dunbar said:

"In discussing the doctrine of equitable assignments in his work on Equity Jurisprudence (section 1284, and notes), Mr. Pomeroy says: 'The order on a future fund, which thus operates as an equitable assignment, should be carefully distinguished from a mere promise to appropriate an existing or future fund in discharge of an obligation, or a mere promise to give an order on a fund, and the like.' In this case there was no order on a future fund, but it was a mere promise to appropriate a future fund in discharge of an obligation. See also Beach, Mod. Eq. Jur., Sec. 291. * * * "

Silent Friend Mining Co. v. Abbot, 7 Colo. App., 73, 42 Pac. Rep., 318, 319, 320, was almost this case, for there an agreement was made to pay a debt out of the proceeds of ore to be mined by the debtor. Thompson, J., said:

"The ore belonged to the company. It extracted, shipped and sold it, and, when it received the price of its ore, the money was its own. The agreement gave the plaintiffs no interest in the money as such. It was simply a promise by the company that, when it received the money, it would apply it in payment of the debt; and, until it should do so, no title in the money could pass to the plaintiffs. If it failed in the fulfillment of its promise, the plaintiff's remedy was by an action at law against the company for breach of contract.

As to what does, and what does not, constitute an equitable assignment of a fund, there has been considerable adjudication. In Bradley's case, Ridg. t. Hardw., 194 (decided in 1744), the chancellor held that a promise to pay the plaintiff's demand out of a specific debt did not create a lien upon the debt, saying: 'It is common for persons who have expectations from the deaths of their friends to promise to pay their debts out of such legacies; yet such promises will not bind such legacies specifically, notwithstanding such creditors might think they had a right to such an express lien by virtue of their forbearance.' In *Christmas' Admr. v. Griswold*, 8 Ohio St., 558, the agreement was that Christmas should pay Fassett $7,435 out of the first money he should receive from sales of certain lands, etc. The court said that the contract could not operate as an equitable assignment, and created no lien in favor of Fasset's estate upon Christmas' share of the proceeds of the lands; quoting the following from Hare & Wallace's notes

to Leading Cases in Equity: 'It is necessary, moreover, in order to constitute an assignment, either in law or equity, that there should be such an actual or constructive appropriation of the subject-matter assigned as to confer a complete and present right on the assignee, even when the circumstances do not admit of its immediate exercise. A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he received it, will not operate as an assignment, for it does not give the covenantee a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual.' * * *"

(4) BANKRUPTCY GAVE NO HIGHER RIGHT TO INTERVENORS.

So much has been written upon the theory that there was no equitable assignment even if a solemn contract had been made by the debtor to pay for advances out of coal to be by it mined in the future. In other words had there been no bankruptcy, the alleged agreement created nothing more than a general debt enforcible at law. So it was recognized and expressly decided in *ex parte Tremont Nail Co.*, 24 Fed. Cas., 183, 184, No. 14168, where it was sought in bankruptcy to establish an equitable charge because the bankrupt obtained credit upon a promise to pay the debt out of moneys to be by him collected from a customer for whom he was filling a large order. So the question was presented in *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App., 73, 42 Pac., 318, 320, where the court held that no equitable charge arose out of an agreement to pay a debt out of the proceeds of ore to be mined in the future. The court, among other things, said:

"Counsel seem to be impressed with the idea that the adjudications have been, for the most part, in cases where the rights of third parties were involved, and that the decisions were in some manner affected by that consideration. We do not find such to be the case. Their doctrine clearly is that an agreement like the one before us does not operate as an assignment at all. A claim, otherwise valid and enforcible, may be postponed or defeated by intervening outside rights, but here the plaintiffs had no claim whatever against the fund, and they mistook their remedy when they invoked the aid of a court of equity * * *"

Therefore, if bankruptcy had not ensued, the claim of the

railway company could not have been imposed as an equitable charge upon the property; hence irrespective of every other question in the case, intervenors were not entitled to prevail, nor the railway company to a preferential allowance.

III.

Respective theories as to the alleged modification of the written contracts.

(1) THEORIES OF APPELLEES.

The theories upon which appellees have proceeded are:

(a) The oral arrangement between the Mount Carmel and the railway companies, whereby money was advanced by the railway company to be deducted from future bills to be rendered by the Mount Carmel Company, entered into, formed a part of, and modified the original written lease made by the Mount Carmel Company with intervenors, and that a failure on its part to comply with its obligations to the railway company in respect to repayment of such advances established a right in favor of the *other* two parties to the contract to rescind same.

(b) Because the oral arrangement entered into and formed a part of the original written contract, the obligation to repay the advances made by the railway company became a burden inseparably attached to the original contract, insomuch, that upon the adjudication in bankruptcy of the Mount Carmel Company it became incumbent upon the receivers and trustees to elect, to reject, or else to wholly assume the written contract as modified orally with the burden of repaying to the railway company the advances made by it.

No doubt can exist that this was the position of the intervenors in the District Court, because Judge Pollock (Rec., 107) said:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the railway company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed. The sole insistence of petitioners in this court is, that as between the bankrupt and the petitioners the written contract was, before the institution of the proceedings in bankruptcy, modified by an oral agreement entered into when the money was advanced, that the bankrupt was in the months of July and August, 1905, to deliver to the railway company, coal at the prices named in the contract sufficient to discharge the obligation incurred by the bankrupt to the railway company on account of the advances made; that such oral modification entered into and formed a part of the contract between the parties at the date of the institution of the bankruptcy proceedings in this court and the appointment of the receivers. * * *"

At no time by exception (Rec., 22) or assignment of error (Rec., 114) was the correctness of this statement in anywise challenged.

The prayer of the intervening petition (Rec., 35, 36) was only:

"* * * that J. E. Hurley, Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said the Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal and Mining Company, the Osage Carbon Company and the Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract."

In disclaiming (Rec., 107) any right to a preference, in join-

ing the Cherokee and Osage companies as intervenors when neither was a party to nor interested in the alleged verbal modification, and in seeking, as did the petition (Rec., 35, 36) not to recover any debt but a cancellation of the lease for a violation of its terms as modified, it is manifest that the intervenors made their entire case rest upon the proposition that there was a modification of the written contract. Hence if there was no such modification they have no case.

(2) THE FINDING OF THE REFEREE.

The referee (Rec., 108) accepted the issue thus tendered by intervenors and expressly found that no modification of the written contract was made or intended to be made, his language in this regard being:

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be repaid by money due the coal company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance moneys to meet the payrolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made to meet payrolls."

(3) THE FINDING OF THE DISTRICT COURT.

Judge Pollock in the District Court, in confirming the referee's finding (Rec., 109), said:

"First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to

the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway company for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal during the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a future time with interest. In such case the bank would have a perfect legal demand for repayment of money but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receivers or trustees. * * *"

The learned judge, after a review of the authorities (Rec., 110, 112) also held (Rec., 112) that if there had been a written modification of the contract just as alleged it would not have given any right to cancel the original lease because no such privilege was reserved by the alleged modifications. His conclusion (Rec., 112) was thus expressed:

"In the light of these authorities, I am persuaded, had the subsequent independent contracts for advancements made entered into and formed a modification of the original lease, as claimed by petitioners, its non-performance by the bankrupt or the failure of the receivers or the trustees to perform in accordance with its terms would not work a forfeiture of the lease, because the parties at the time of the making of the lease expressly stipulated the breach of what conditions therein written should work a forfeiture of the lease, and made no stipulation regarding the advancement of money by the railway company to the bankrupt as was thereafter done. When the new agreement for such advancements was

made it was not then stipulated the failure to repay such advances according to the terms of the subsequent agreement should work a forfeiture of the lease."

His opinion was based upon well settled principles of law applied in the many authorities cited by him, quotations from which are hereinafter set out.

(4) View of the Circuit Court of Appeals.

The views adopted by the majority of the Circuit Court of Appeals (Rec., 122, 129) were: (a) As the parties agreed (Rec., 123, 124) that all advances by the railway company were to be repaid with coal to be subsequently mined by the bankrupt from mines in its own possession, this made (Rec.,125) an equitable assignment and charge upon the property; (b) the statute of frauds did not invalidate the equitable assignment because the advances having been made the contract was partially performed; (c) the trustees in bankruptcy obtained no higher rights than the bankrupt (Rec., 127) and hence when (Rec.,128) they continued the operation of the mine they must have done so under the written contract as orally modified; (d) inasmuch as the leases expired before the decision so the property could not be surrendered, the claim for advances (Rec., 129) was ordered to be paid as a preferential demand. The court thus based its opinion entirely upon the proposition that the written contract had been orally modified, so that if wrong upon that proposition the whole opinion fails.

As to the alleged oral modification of the written contract, it was (Rec., 124, 125) said:

"It appears that the coal company, while the contract was still in force and being executed, became embarassed and unable to meet its payrolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for fifteen days after coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but in furnish-

ing coal in the months of July and August following, at the price fixed by the original contract. This arrangement made when the coal company was in embarassed circumstances and obviously inspired by the necessity of meeting the payrolls and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution."

IV.

However, had there been a modification of the contract exactly as alleged, written out and attached to the original contract, there could have been no cancellation of the lease.

(a) This proposition is sound for the reason already given that since the property out of which the debt was to be paid was left in the custody of the debtor, there was no equitable assignment or charge.

(b) Judge Pollock in the District Court said that "all right * * * to preferential payment * * * is * * * expressly and positively disclaimed," (Rec., 107) and as an independent ground for denying relief held that there having been no reservation of the right of re-entry for a breach of the modified agreement there was no right to a surrender of the property which was the only relief sought. His opinion upon this subject (Rec., 110, 111) was unanswerable and reads:

"Again, as has been seen from the facts stated, the written agreement of lease made among the parties definitely and positively specifies the acts of omission or commission which shall work a forfeiture of the lease, and also definitely and positively states the time and manner in which such forfeiture shall be declared and

enforced by the party or parties injured by the default of the other. It is now sought by petitioners not alone to engraft upon the written lease a new contract or agreement between the parties of which no mention is made in the writing, but also by reason of the breach of such new obligation thus created to have the court order a performance of the obligation which would work a preference in favor of the railway company over the other creditors of the bankrupt (the right to which preference is by the railway company expressly disclaimed), or to decree a forfeiture of the lease on a ground neither specified therein in writing nor claimed to have been made as a part of the oral agreement. To my mind this may not be done, and for this reason: Suppose, for the sake of argument, the agreement made between the railway company and the bankrupt to repay the advances made in coal in future at the rate specified in the contract had by consent of all the parties thereto been endorsed upon or written into the lease, and this obligation had from that time forth formed a part of the written lease, and as in this case had not been performed by the receivers or trustees, would such failure be good ground for forfeiture of the lease? I think not. In the making of the lease as written, the parties agreed the breach of certain conditions therein stated should work a forfeiture. It was not agreed at that time any money should be advanced by the railway company to the bankrupt to be repaid in future in coal, hence of necessity it was not agreed a failure to so repay any advances made would work a forfeiture of the lease. When such agreement for advances was subsequently made no forfeiture for failure of performance of this new covenant was expressly stipulated among the parties, and none can be implied. It would simply be a new and independent agreement or covenant engrafted on the lease, the breach of which would have rendered the bankrupt liable to an action by the railway for repayment, had bankruptcy proceedings not intervened, but would not be such a breach of condition as would work a forfeiture of the entire lease as to all parties, because it was not so stipulated and agreed."

The authorities sustain this view. In 18 A. & E. Enc. of L., 2nd ed., 369, it is said:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants, to pay rent; covenants to pay taxes; covenants not to assign or sub-let."

In re Hague v. *Ahrens*, 53 Fed., 58, 60, it was said:

"The law regards conditions with the same disfavor it does forfeitures; and for similar reasons. A clause will not therefore be treated as a condition if it can be construed a covenant without violence to its terms. If the purpose to create a condition, or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in 'apt terms,' such as 'upon condition,' 'provided nevertheless,' 'so long as,' 'during,' etc. —the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, 'This lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part,' convey no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements, he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: 'A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof.' The inference is strong, therefore, that he did not contemplate similar consequences as a result of a transfer."

To like effect are: *In re Pennewell*, 119 Fed., 1391; *Doe* v. *Godwin*, 4 Maule & S., 265; *Crawley* v. *Price*, L. R., 10 Q. & B., 302; *Den* v. *Post*, 25 N. Y. Law, 285; *Spear* v. *Fuller*, 8 N. H., 174; *Wheeler* v. *Dascombe*, 3 Cush., 285; 1 Washb. Real Prop., Sec. 504.

V.

There was, however, no verbal modification of the written contract.

(1) INTERVENORS TO PREVAIL MUST SHOW THAT THERE WAS A MODIFICATION.

As already shown, intervenors based their entire claim upon the proposition that the original contract had been orally modified so as to pledge as security coal to be mined in the future. They

disclaimed any equitable preference, and as a method of collecting a debt, sought only to cancel the written contract unless the trustees would elect to comply with the alleged oral modifications thereof, upon the theory that the oral modification became part of the written contract. So the majority opinion of the Circuit Court of Appeals, in order to charge the trustees, had to assume that the contract was orally modified, for it was (Rec., 128, 129) there said:

"Any valid modification of the written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. * * * After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract and entered upon its execution. They mined the coal, delivered it to the railway company, and, in the language of the trial court, 'performed fully all the terms of the contract as it was written' but failed to conform to the condition created by the oral agreement to deliver coal to the railway company in payment of the advances made by it to keep the mine going."

If, therefore, there never was any modification of the written contract the whole foundation of the claim must fall; that there was not is plain for several reasons now about to be suggested

(2) ALL THE PARTIES TO THE WRITTEN CONTRACT DID NOT JOIN IN THE ALLEGED MODIFICATION.

The parties to the written contracts (Exhibits A, B, C, D,, Rec., 36, 37) were not only the bankrupt and the railway company, but also the Osage and Cherokee companies. Neither by the allegations of the interventing petition (Rec., 34) nor the proof offered (Ev. Wellman, Rec., 72, 86) was there any pretense that either the Osage or Cherokee company was a party to the modification. It follows, therefore, that a written contract to which there were *four* parties was not, and could not have been

intended to be modified by an oral agreement between *two* of them.

There was in the Circuit Court of Appeals some suggestion that the railway company was in reality the same as the Osage and Cherokee companies. There is nothing in the pleadings or evidence to warrant such a suggestion. Portions of the inventory (Rec., 7, 18) in bankruptcy not offered in evidence nor referred to at the trial, were for some undisclosed reason incorporated in the transcript and at one place therein there is (Rec., 11) this recital:

"This company owns no real estate or coal deposits, but is simply an operating company, which has for 8 years past worked under contracts and leases with the Atchison, Topeka & Santa Fe Railway Company, and said railway company's *affiliated* coal companies—the Cherokee & Pittsburg Coal & Mining Company and the Osage Carbon Company. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies, and from coal deposits owned jointly by the said Cherokee company and Crawford County Coal Company."

Even had some kind of an affiliation been proven or even the ownership of all the stock of these companies been shown to be in the railway company, this would not have affected the question, as these corporations were distinct legal entities and would not have been in the eyes of the law either owned or controlled by the railway company. In *Pullman's Palace Car Co. v. Mo. Pac. R. Co.*, 115 U. S., 587, 597, 29 L. Ed., 499, 501, 502, Mr. Chief Justice Waite said:

"We are also of the opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road, it has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors; but there

the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific."

This doctrine has been repeatedly approved even in stronger language. (*Porter* v. *Pittsburg, etc., R. Co.*, 120 U. S., 649, 30 L. Ed., 830; *Humphreys McKissack*, 140 U. S., 304, 35 L. Ed., 473, 475; *Jessup* v. *Ill. Central R. Co.*, 36 Fed. Rep., 735, 741; *American Preserves Co.* v. *Norris*, 43 Fed. Rep., 711, 714; *Electric R. Co.*, v. *Jamaica, etc., R. Co.*, 61 Fed. Rep., 655, 678; *Exchange Bank* v. *Macon, etc., Co.*, 97 Ga., 7, 25 S. E. Rep., 326, 328; *White* v. *Pecos Land, etc., Co.*, 18 Tex. Civ. App., 637, 45 S. W. Rep., 207, 209.)

(3) FINDINGS BELOW AND THE WEIGHT TO BE ATTACHED THERETO.

The referee expressly found (Rec., 108):

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the coal company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance money to meet the payrolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made to meet pay-rolls."

Judge Pollock, in the District Court (Rec., 109), thus approved the finding of the referee:

"From a careful reading of the record in this matter and consideration of the briefs and arguments of solicitors, in my judgment the conclusion reached by the referee is right and should be confirmed, and this for many reasons. First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway company for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a certain time with interest. In such case the bank would have a perfect legal demand for repayment of the money, but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receiver or trustees."

Great weight should be attached to a finding of the referee thus approved, the case being analagous to a finding of fact by a master approved by the Circuit Court, and in that situation reaching the appellate tribunal. The rule in such instances has often been stated.

In *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 62 C. C. A., 351, 127 Fed. Rep., 625, 633, Judge Richards said:

"The principal contention is the charge of fraud. Since this involved disputed questions of fact upon which the master and the

court below agreed, there must, under the rule, be a very plain showing of mistake to authorize us to go behind the report as confirmed by the court. * * *"

In *Buckingham* v. *Estes*, 63 C. C. A., 20, 128 Fed. Rep., 584, 587, Judge Lurton said:

"The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify, unless a very plain mistake is definitely pointed out. * * *"

In *Last Chance Mining Co.* v. *Bunker Hill, etc., Co.*, 66 C. C. A., 299, 131 Fed. Rep., 579, 587, 588, Judge Ross said:

"Findings of fact made without any evidence to support them may, and should, as a matter of course and of law, be disregarded; but findings made by a master in pursuance of an order to take the proofs and report the facts and conclusions of law to the court, that depend upon conflicting testimony, or upon the credibility of witnesses, especially as in the present case, they are approved by the trial court, will not be disturbed. * * *"

In *Crawford* v. *Neal*, 144 U. S., 585, 596, 36 L. Ed., 552, 557, Mr. Chief Justice Fuller said:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. * * *"

Mr. Justice Brewer subsequently (*Furrer* v. *Ferris*, 145 U. S., 132, 36 L. Ed., 649) quoted the language with approval, and it has become the settled rule of this jurisdiction. (*Simpson's Patent Dry Dock Co.* v. *Atlantic, Etc., Co.*, 47 C. C. A., 443, 108 Fed. Rep., 425; *Ferguson Contracting Co.* v. *Manhattan Trust Co.*, 55 C. C. A., 529, 118 Fed. Rep., 791.)

3. IMPROBABILITY OF THE ORAL ARRANGEMENT.

A good reason for saying it was improbable that the parties ever intended to so orally modify the written contract as to create

an equitable charge or assignment, is found in the *written* modification of August 30, 1900 (Rec., 67), while the alleged practice of making advances was in force (Rec., 78) which made this provision:

"Ninth: The Mount Carmel Company shall, upon the execution of this agreement, give a good and sufficient bond in the sum of one hundred thousand dollars ($100,000) for the full and faithful performance of its covenants and agreements under said agreement of October 1st, 1896, and said supplemental agreement of June 1st, 1898, and these presents, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the president and treasurer of the railway company, and upon the execution and delivery of said bond, the coal companies and the railway company shall cancel, surrender and deliver to the Mount Carmel Company any bond heretofore executed by it or by said Charles J. Devlin in that behalf."

It is almost inconceivable that the Mount Carmel Company should give a bond of one hundred thousand dollars, with sureties satisfactory to the railway company, to secure the payment of any obligation upon its part and then be required thereafter orally to agree to assign the coal which it should mine in the future, especially when prior thereto there had been in existence a custom of making such advances; it is absolutely inconceivable in such circumstances to believe that the parties intended to make any oral pledge or assignment.

(4) THE ALLEGED ORAL MODIFICATION MUST HAVE BEEN CLEARLY PROVEN.

(*a*) To prove such an oral modification of a written contract as would result in an equitable assignment or charge, "it is most important to have clear and satisfactory evidence as to the exact words used." Such was the view as expressed by Lord Justice James in *Thompson L. R.*, 5 Ch., 659, and approved by Mr. Justice White in *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 649, 41 L. Ed., 855, 863, the case relied upon by the Circuit Court of Appeals. There are additional reasons for such a rule to be applied in this case.

(*b*) The Kansas Statute of Frauds (Comp. Laws of Kan., 1905, Sec. 3255) provides:

"No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

If the original contract had to be in writing, this statute likewise required any modification thereof to be also written. (*Bell* v. *Coffin*, 2 Kans. App., 337; *Emerson* v. *Slater*, 22 How., 28, 16 L. Ed., 360; *Warren* v. *Mayer Mfg. Co.*, 161 Mo., 112, 121.) The Circuit Court of Appeals said, however, that the parol contract here was taken out of the statute of frauds by part performance. In such case the settled rule (2 Jones on Ev., Sec. 436) is:

"It is not the province of the courts to make contracts; and it is a familiar rule that the party who relies on part performance as removing the bar of the statute of frauds must produce *definite and convincing proof as to the nature and terms of the oral contract on which he relies.* * * *"

In *Purcell* v. *Coleman*, 4 Wall., 513, 18 L. Ed., 435, 436, Mr. Justice Grier said:

"A mere breach of a parol promise will not make a case for the interference of a Chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory and indubitable proof.

First—Of the contract, and of its terms. *Such proof must be clear, definite and conclusive*, and must show a contract, leaving no *jus deliberandi* or *locus poenitentiae*. It cannot be made by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately

remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted."

In *McKinnon* v. *McKinnon*, 46 Fed. Rep., 713, 718, 719, Judge Philips said:

"The party relying upon such parol contract must make full, satisfactory and indubitable proof of the contract—a proof which must show a contract leaving no *jus deliberandi* or *locus poenitentiae*, and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, that the consideration has been paid. * * *"

In *Marr* v. *Shaw*, 51 Fed. Rep., 860, 864, Judge Sanborn said that the proof must be "full, clear and satisfactory."

In *Walcott* v. *Watson*, 53 Fed. Rep., 429, Judge Hawley said that it must be "certain and unequivocal in all its essential terms."

In *Semmes* v. *Worthington*, 38 Md., 298, it was said that in such case "the proof must be clear and explicit, leaving no room for reasonable doubt."

In *Langston* v. *Bates*, 84 Ill., 524, it was said that the contract "should be clear and certain in its terms and established by testimony of an undoubted character which is clear, definite and unequivocal."

(5) THE EVIDENCE DID NOT WARRANT THE FINDING OF ANY INTENTION TO MODIFY THE WRITTEN CONTRACT.

We approach this question bearing in mind that neither the Cherokee nor Osage Company was a party to the alleged oral modification, the presumption attending the findings of the referee and trial court, the fact that the Mount Carmel Company had given bond to secure its promises, and the rule that there must be clear, definite and convincing proof as to the exact words used before an oral modification can be found. It is claimed that the modification was arranged by Mr. Wilder, treasurer of the Railway Company, and Mr. Devlin of the Mount Carmel Company. Both are now dead. The only witness by whom it was attempted

to be proven was A. O. Wellman (Rec., 72-86), whose testimony deals in general conclusions without a single specific detail as to conversations or pointed statement of fact, and is wholly unsatisfactory, coming within the condemnation of Mr. Justice Grier in *Purcell* v. *Coleman*, 4 Wal., 513, 18 L. Ed., 435, 436. The extent to which it goes is this only: Devlin from time to time, in accordance with a custom in existence for years, had money advanced to him by the railway company, not to meet the pay-roll, but to pay debts to banks and thereby maintain a credit, upon which he, from time to time, borrowed money to meet his pay roll. His extended examination resulted in this (Rec., 86) statement:

"Q. Now, to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay-roll, and then when that note came due, and his next pay-roll must be met, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes and then they let Devlin have the additional money? That is a fact, is it? A. Yes."

The extent of the arrangement was not any specific arrangement, but a mere advancement of money, with the expectation of repayment by credits upon bills when settlements were made for coal delivered in the future. It was thus (Rec., 78, 79) stated:

"Q. As a matter of fact it was not a novel thing for the Santa Fe Railway to loan Mr. Devlin money, which he was supposed to subsequently pay by furnishing coal? A. We only furnished him money for pay-roll purposes.

Q. That was the practice indulged in by your office for a considerable length of time? A. Almost every time Devlin started in his mines we furnished him money for pay-roll purposes.

Q. At times you furnished larger sums of money than the amount set up in this exhibit, did you not? A. We have.

Q. Did you uniformly get interest on those loans you made Mr. Devlin? A. When we advanced in advance of settlement day,

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which I stated was the 15th of the succeeding month, we got interest.

Q. Was that a uniform practice also? A. Yes.

Q. There was nothing in connection with the particular items that were set forth as your charge in Exhibit "E" that differed from the general practice in the course of business you had been following with Mr. Devlin, practically ever since he had been in the coal business? A. Well, now, I don't exactly grasp your question.

Q. Whatever money you put up or loaned to Mr. Devlin on these three different occasions you mention in Exhibit 'E' was along the same general plan you had previously advanced him money on many occasions before that? A. These specific items here came to my mind forcibly, as I have stated, for this purpose.

Q. As I say, you had repeated that experience many times in the past with him? A. Yes.

Q. This is simply a continuation of a practice that had obtained between your company and Mr. Devlin's company many times before that? A. For pay-roll purposes, yes."

This method of advancement existed under the contract of October 1, 1896 (Ex. A, Rec. 37-57), which was thereafter upon June 1, 1898 (Ex. C, Rec. 58-63), and upon August 30, 1906 (Ex. D, Rec. 63-67), modified in writing, yet at neither time was a word inserted upon the subject of the alleged *oral* modification, though the writing of August 30, 1900 (Rec. 67), required the Mount Carmel Company to give a bond of $100,000 to secure its promises. The conversations between the parties were not detailed. The specific agreement alleged to make advances in May and June to be repaid in July and August was not even testified to. The verbal modifications, if any, never purported to modify or change the original contracts of lease. They provided for payment by the Railway Company on or before the 15th day of each month for all coal sold and delivered during the previous thirty days. The payment, therefore, by the Railway Company previous to the 15th of any month for coal already delivered was strictly in conformity to the terms of the original contract. The bills for coal delivered were not vouchered until the 15th of the month, but the deliveries were going on during the previous thirty days.

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While the Railway Company was not obliged to pay for the coal as delivered, yet it might do so under the contract, and it seems that, as an accommodation to the Mount Carmel Company, it was in the habit of so doing. The amounts of coal delivered from month to month varied, so that more money had at the time of the bankruptcy been advanced than was sufficient to pay for current deliveries and the account showed an over payment. The true state of facts warrants no inference further than this. All that is asked is that this court real the testimony of Mr. Wellman, who says there was no specific conversation or arrangement, or as shown (Rec. 78) at one place, only a *general* understanding of long standing:

"Q. In your testimony with reference to these conversations you have had with Mr. Devlin—in your testimony to Judge Smith did you have in your mind any particular time in which you said you had any conversation with Mr. Devlin? A. I understood the question was general, and the conversation general."

VI.

The trustees never elected to assume the alleged oral modification.

(1) The majority opinion of the Circuit Court of Appeals (Rec. 128, 129) proceeded upon the theory that the trustees in bankruptcy must elect whether to adopt or reject existing executory contracts, and assumed that when they proceeded with the execution thereof they necessarily adopted same, hence by the mere operation of the mine, as a matter of law, must be held to have adopted not only the written contracts, but any unknown oral modifications thereof. This, however, was *obiter dictum* because it was said under the discussion of the subject whether the trustees in bankruptcy had any rights *superior* to the bankrupt. We undertake to say that if the argument was used for any other purpose, such a startling doctrine was never before expounded and not one of the cases cited in the opinion sustains the proposition. Besides

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the petition of intervention did not proceed upon that theory, but only sought to establish the alleged oral contract, and then compel the trustees to elect whether they would assume or reject the same.

(2) The trustees had no knowledge of the existence of the verbal modification. Cyrus Leland, one of them (Rec. 88, 89), testified:

"Q. Did you ever know there was any contention by the Santa Fe Railway Company that Mr. Devlin had attempted to make any verbal contract in any respect modifying any written lease? * * * A. No, I didn't. * * *

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged verbal agreement Mr. Devlin is supposed to have made prior to the receivership? A. I never knew anything about it."

Walter Reeves, another trustee (Rec. 90), testified:

"Q. I will ask you when, if ever, you heard of any claim of a verbal contract between the Santa Fe and the Mount Carmel Coal Company, or Mr. Devlin? A. Today for the first time."

Judge Pollock, speaking for the District Court, said "the alleged oral agreement" was "unknown to the receivers and the court at the time of their appointment."

The order upon the trustees, then receivers, made July 7, 1905 (Rec. 92), recited:

"* * * if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between said Cherokee & Pittsburg Coal & Mining Company, and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made."

This, by its very language, related not to the oral modification, but only to the written contract, because it referred to the contract to which the Cherokee and Osage Companies were parties and they had no part in the modifications. The intervention was never presented (Rec. 32) until November 20, 1905, and no steps ever taken to hurry the trial or advance its hearing in the Circuit Court of Appeals. It is, therefore, manifest that neither

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the trustees nor the District Court ever intended that there should be any assumption of the alleged oral modification. It is inconceivable to say that they elected to assume a contract the very existence of which they were at the time denying.

(3) It is equally certain that intervenors never claimed or intended to claim any such assumption because the intervening petition (Rec. 35, 36) was in reality one to establish the alleged oral modification and to put the trustees to their election whether to assume or reject same, because in it the lessors and the Railway Company asked the alternative relief that the trustees either pay the Railway Company for the advances or else give possession of the mines in accordance with the terms of the written lease. So, upon the trial in the District Court, after disclaiming any right to a preferential claim, the position assumed by the intervenors was to compel the trustees to elect to assume or reject the verbal modification. Judge Pollock then said (Rec. 107) of their position:

"Therefore, it is contended equity will not permit the trustees to now assume and carry out the terms of the contract as it stands written because by them deemed beneficial to the bankrupt estate, but that if the trustees elect to assume performance of the contract at all they must undertake it with all its burdens and must either furnish the coal agreed to be furnished by the bankrupt to the Railway Company in accordance with the terms of the claimed oral modification of the agreement, or forfeit all rights under the lease and surrender the leased premises to petitioners, and it is so prayed."

(4) Of course the trustees were put to their election as to whether they would or would not reject existing executory contracts, but as is the case with every other assignee, it was a question of what contract they were to make an election. Surely not one which was claimed not to exist. The court's order (Rec. 92) only related to the *written* contract. Intervenors sought only to compel an election to adopt or reject the oral contract. The Circuit Court of Appeals, however, said that by acting under the written contract they took subject to an oral modification of which

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they knew nothing and which they never intended to adopt. No authority has ever gone this far. The doctrine is absurd, and would put trustees to their peril in contesting the terms of existing arrangements.

It has been held that upon bankruptcy the trustee has the election whether he will adopt or reject the terms of an existing lease. (*Watson* v. *Merrill*, 69 C. C. A., 185, 136 Fed. Rep., 359, 363; *In re Chambers*, 98 Fed. Rep., 865; *Ex Parte Houghton*, 1 Low., 554, 12 Fed. Cas., 584, No. 6725.) The same principle applies to receiverships, and mere use of the property, no matter how long continued, does not operate as an election. This has been said too often to require discussion. (*Q. M. & P. R. Co.* v. *Humphreys* 145 U. S., 105, 113, 36 L. Ed., 640; *U. S. Trust Co.* v. *Wabash R. Co.*, 150 U. S., 287, 37 L. Ed., 1085; *N. Y. etc. R. Co.* v. *N. Y. etc. R. Co.*, 58 Fed. Rep., 268; *Ames* v. *U. P. R. Co.*, 60 Fed Rep., 966, 971.) There must, however, be a purpose and intention to assume the lease and become the assignee thereof (id.), otherwise there is no assumption. If one is put to an election he is never bound thereby until he knows the facts. Thus, in 2 Story Eq. Juris., 13th Ed., Sec. 1098, it is said:

"The general rule is that the party is not bound to make any election until all the circumstances are known and the state and condition and value of the funds are clearly ascertained; for until so known and ascertained it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him."

It is not therefore possible that because under an order of court the trustees acted under the *written* lease they became bound by an *oral* modification of which they never heard. So that, as the intervening petition conceded, there never was an election to assume the oral contract.

Probably all that was meant by the Circuit Court of Appeals was that the trustees had no higher rights than the bankrupt.

TO EDGE

None need be claimed. The alleged oral modification never did and never could create any equitable charge or lien against the property and therefore the trustees took it free therefrom. So, as a matter of fact, no oral modification of the written contract was made, hence nothing existed but the personal obligation of the bankrupt. As there was as between the Railway Company and the bankrupt no equitable charge against or lien upon the property, nor any burden upon the written contract, none could exist as between intervenors and the trustees, unless and until the latter elected to adopt the *oral* arrangement as a modification of the written contract, or at least until they elected to adopt the oral modification after it was found to exist.

VII.

The Circuit Court of Appeals had no right to allow the claim as preferential.

(*a*) In the District Court intervenors disclaimed any right to a preference (Rec. 107), the record in this respect reciting:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railway Company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

No preference was claimed by the prayer of the petition.

(*b*) The Circuit Court of Appeals (Rec. 129), however, said:

"From the foregoing the conclusion follows that the learned trial court should have sustained the intervenors' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Compnay sufficient coal to cover its advances. Not having done so and the lease having expired so that

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it cannot now be done, the assets of the estate, consisting *in part* of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim."

Without any showing of the amount of money advanced which came into the hands of the trustees, an order of preference was made. No ground, therefore, existed. No reason can be given. Manifestly, if one could upon proper pleadings be given, it could not be in this case where there was no equitable charge against the property.

Respectfully submitted,

JOHN S. DEAN,
FRANK HAGERMAN,
Solicitors for Appellants.

TO EDGE

Office Supreme Court, U. S.
FILED.
JAN 27 1903
JAMES H. McKENNEY,
Clerk.

The Supreme Court of the United States.

October Term, 1902.

E. Hoyt et al., Commissioners of Barbour County, Kansas, Appellants,
vs.
Mt. Carmel, Court Number,

No. 95.

Atchison, Topeka & Santa Fe Railroad Company et al.,
Appellees.

Appellants' Suggestions in Reply.

Statement of the Case.

In the Supreme Court of the United States

OCTOBER TERM, 1908.

No. 95.

J. E. HURLEY ET AL., TRUSTEES IN BANKRUPTCY OF THE ESTATE OF THE MT. CARMEL COAL COMPANY,
Appellants,

v.

ATCHESON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

APPELLANTS' SUGGESTIONS IN REPLY.

(1) It is contended that the appeal in this case should be dismissed because: (*a*) There was no certificate of a Justice of this court as required by section 25*b* of the Bankrupt Act and the question involved is not one which, as provided by that section, might have been taken on appeal or writ of error from the Supreme Court of the state; and (*b*) there was no finding of fact as required by General Order XXXVI.

(2) The appeal was in fact taken under the Act of March 3, 1891 (26 Stat. L., 828; 4 Fed. Stat. Ann., 409), and not under the special provisions of the Bankrupt Act. Therefore, as decided in Hewit *v.* Berlin Machine Works (194 U. S., 296; 48 L. Ed., 986), there was the

right of appeal irrespective of section 25*b* and General Order XXXVI. Furthermore, no debtw as *presented* for allowance. Hence there was not the "allowing or rejecting a claim under this Act" within the meaning of section 25*b*, nor any "appeal *under* the Act" as provided for by the General Order.

(3) General Order XXXVI could not have been complied with because it requires findings of fact to be made and conclusions of law to be given *at the time* the case is decided. Up to the time of the decision below there had been no debt *presented* for allowance, the right asserted being solely one for the recovery of property. To say now that *after* a decision, a finding *might* have been obtained as of proper time, merely puts the right of appeal, absolute under the law, within the discretion of the court below and deals in speculation. No one can say whether the court below would have granted the request. It has been decided that a request must be made *before* decision (Knapp *v.* Trust Co., 162 Fed. Rep., 675).

(4) Savings Deposit Bank and Trust Company *v.* Loeser (209 U. S., 542), is, however, cited as conclusive. That appeal was from the case reported in 148 Fed. Rep., 975, 78 C. C. A., 597, where it appears that a debt secured by mortgage was *presented* for allowance, specific provision being made therefor by section 57*e* of the Bankrupt Act. Clearly then that was a matter for which *special* provision was made by the bankrupt law. Nothing appears in the report to show that the appeal was under the Act of March 3, 1891. When the case subsequently came before the Circuit Court of Appeals (163 Fed. Rep., 212), Judge Lurton, speaking of the first decision said: "Subsequently the case was taken by an appeal of the bank to the Supreme Court, where, upon April 7, 1908, the appeal was dismissed, without opinion. The mandate to this court recites only that the appeal was dismissed 'for the want of jurisdiction.' *It would be idle to speculate as to the grounds upon which this action was taken.*"

(5) It is probable that the appeal in the Loeser case (209 U. S., 542), was dismissed because solely taken under the Bankrupt Act or else because the decree was one of reversal, for Judge Lurton (163 Fed. Rep., 212, 216) subsequently said: "Manifestly the case did not overrule Hewit *v.* The Berlin Machine Works, 194 U. S., 296, 300; 24 Sup. Ct. Rep., 690; 48 L. Ed., 986."

(6) Here, however, because the decree was one of reversal, a dismissal of the appeal is not authorized, for these reasons:

(*a*) The language (Rec. 129) of the decree appealed from is

> "From the foregoing, the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances. Not having done so and the lease having expired, so that it cannot now be done, the assets of the estate consisting in part of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim. The decree is accordingly reversed and the cause remanded with instructions to proceed according to this opinion."

There was no dispute as to the amount because the referee (Rec. 30, 31) found "the advances made by the Santa Fe Company, which are before the court for consideration, are three in number * * *. Various credits have been allowed against these advances, reducing the amount of petitioner's claims to $57,304.16." The trustees neither excepted to this finding, nor sought to review it. They are therefore bound thereby. Hence, there is not and has never been any dispute as to the amount due. The sole controversy now is as to the

preference which has been absolutely ordered. The decree is therefore final. This both sides concede. Even appellees do not desire a dismissal upon this ground.

(*b*) A decree is final if, as here, it directs a court below to proceed in accordance with the mandate (Merrill *v.* National Bank, 173 U. S., 171; 43 L. Ed., 640; Beasley *v.* Texas and P. R. Co., 191 U. S., 494, 48 L. Ed., 274), or remands with directions to dismiss (Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. Ed., 822), or to enter a judgment upon special findings (Mower *v.* Fletcher, 114 U. S., 127, 29 L. Ed., 119).

(*c*) If, however, the appeal should be dismissed upon this ground it should be plainly stated so that after a retrial the case can again be brought here.

Respectfully submitted.

FRANK HAGERMAN,
For Appellants.

FILED.
DEC 28 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

[redacted]

Appellants.

vs.

[redacted]

Appellees.

No. 95.

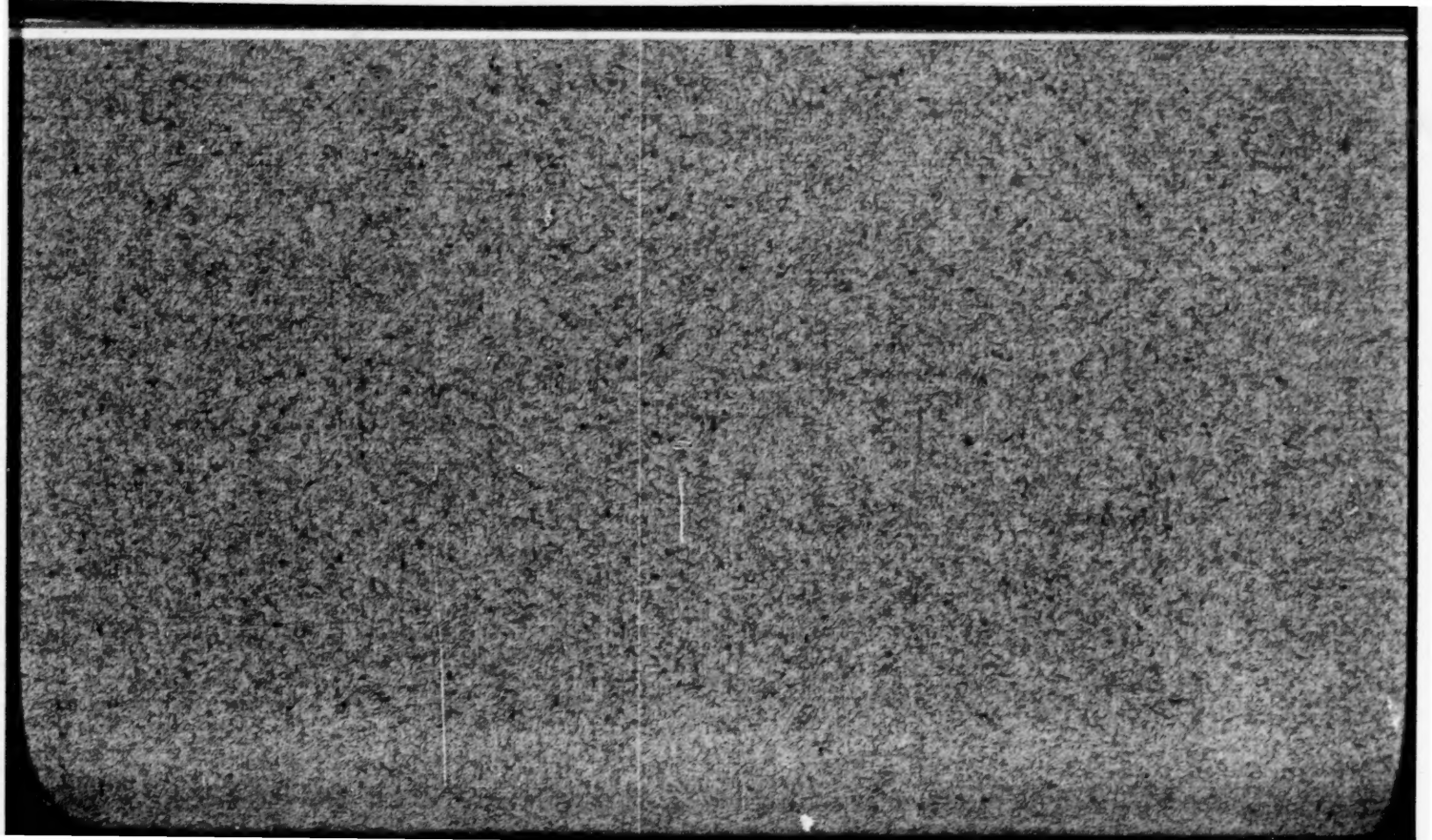
Appeal from United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEES' BRIEF.

[redacted]
Attorneys for Appellees.

[redacted]
Of Counsel.

[redacted]



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the estate of the Mount Carmel Coal Company, Bankrupt, *Appellants,* *vs.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY, *Appellees.*	No. 95. Appeal from United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEES' BRIEF.

The statement of our opponents is colorless, and in some respects inaccurate, though perhaps not designed. It omits some facts necessary to a correct understanding. The transactions involved were had between live, intelligent business men, and, to intelligently understand the facts, it will be necessary to set out the same in chronological order with the circumstances which surrounded the parties, and to place ourselves in the situation of the parties to the transactions involved.

The Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company, affiliated with or controlled by the Railway Company, owned coal mines in Osage and Crawford Counties, Kansas. On October

1, 1896, these parties entered into a contract with Charles J. Devlin, a copy of which was attached to the intervening petition filed in the bankruptcy proceedings. This contract shows that the Osage Carbon Company gave to Devlin for a term of three years the right or license to mine, extract and sell coal from lands therein designated in Osage County, and the Cherokee and Pittsburg Coal & Mining Company granted him similar rights for the same period in respect to lands in Crawford County. Among other things Devlin agreed to pay certain rentals and royalties on the coal mined and to do certain other things as in the agreement specified in regard to opening and developing coal mines. In the 22nd Article of this agreement (Rec., 51 and 52) Devlin was obligated to sell and deliver to the Railway Company of coal so mined under the agreement all the coal required by it in the operation of its lines of railway in Kansas as far west as Newton (the Railway also having the option to take more coal for other lines), at the prices fixed in said agreement, which prices were to be varied or adjusted according to certain conditions therein specified in respect to wages of miners. (Rec., 53.) In the 17th Article (Rec., 49) provision was made by which either the "Coal Companies" (so designated in the agreement) *or* the Railway Company might terminate the agreement for failure of said Devlin to perform any of his obligations, covenants or agreements, if within thirty days after written notice of such failure and the nature thereof he did not cure such failure by performance satisfactory to the Railway Company and the "Coal Companies."

In Article 28 it was provided that neither the lease

and agreement nor any interest therein should be assigned by the said Devlin without the consent of the "Coal Companies" and the Railway Company given in writing by their respective presidents. (Rec., 55.)

As stated heretofore, the "Coal Companies" were controlled by the Railway Company and, as is apparent from a reading of the contract, one of the main purposes of the so-called lease and agreement was to secure to the Railway Company an adequate supply of coal needed by it for the operation of its railways, or, as stated in the opinion of the Circuit Court of Appeals (Rec., 124):

> "The clear intent and purpose of the main contract, so far as the Railway Company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years,—a provision so important to the Railway Company itself and to the traveling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the Coal Company's" (a subsequent assignee of Devlin's) "rights under the lease if it failed to observe its contract obligations."

With the consent of all parties Devlin subsequently assigned his interest under the lease and agreement to the Mount Carmel Coal Company, of which he was and at all times continued to be the president. Afterwards on June 1, 1898, a contract was made between the Osage Carbon Company, the Cherokee and Pittsburg Coal & Mining Company and The Atchison, Topeka and Santa Fe Railway Company with the Mount Carmel Coal Company extending for a further period all of the provisions of, and modifying in some particulars not important to this case, the first named agree-

ment. Afterwards on August 30, 1900, another contract was entered into by the Osage Carbon Company, the Cherokee and Pittsburg Coal & Mining Company and The Atchison, Topeka and Santa Fe Railway Company with the Mount Carmel Coal Company extending the provisions of the foregoing contracts, with some modifications not important in this litigation, until June 1, 1906. (Rec., 33 and 34.)

The transactions out of which this litigation arose were largely had with and were testified to by A. O. Wellman, Assistant Treasurer of the Railway Company. Mr. Devlin, the president of the Mount Carmel Coal Company had most of the dealings direct with Mr. Wellman as Mr. Wilder, the treasurer of the Railway Company, was absent from the office and Mr. Wellman was thoroughly cognizant of the transactions involved by reason of his position with the Railway Company. Owing to numerous objections interposed by the attorney for the trustees and the disconnected manner in which his testimony was given, it will be almost impossible to give extracts from his evidence; therefore to understand the true nature of the dealings had it will be necessary to read his entire testimony. The sum and substance of his evidence disclosed the following facts:

Almost from the beginning of the lease and agreement it had become the practice of Mr. Devlin as president of the Mount Carmel Coal Company to request the Railway Company to make advances to the Mount Carmel Coal Company on account of coal which the latter was required to furnish under the terms of the lease and contract. The advances requested would

vary in amount from time to time and were generally required, according to Mr. Devlin's representations, to enable the Mount Carmel Coal Company to meet its pay-rolls and pay its employees, thus preventing a shut-down of its mines. (Rec., 73 and 74.)

Relying upon the obligation of the Mount Carmel Coal Company under its lease and contract to furnish the Railway Company with the coal needed at the prices stated therein and instead of waiting until the 15th day of the month following the month in which coal would be furnished, the Railway Company on these various occasions anticipated the time of making its payments as required, by advancing moneys at the request of the Mount Carmel Coal Company. Such advancements were, of course, made in anticipation of the furnishing of coal which the Mount Carmel Company was required to supply under the written lease and agreement. Such advances would be subsequently adjusted by the parties when bills or invoices for coal would be furnished by the Mount Carmel Coal Company and the Railway Company would pass its vouchers therefor. (Rec., 74.)

The practice in force was for the Mount Carmel Coal Company to send to the General Purchasing Agent of the Railway Company invoices of coal furnished from the mines under the agreement during the current month, and the purchasing agent would make out a voucher of the Railway Company in favor of the Mount Carmel Coal Company for coal specified in these invoices. This voucher would be deliverable to the Mount Carmel Coal Company on the 15th day of the following month and would be presented by the

Mount Carmel Coal Company to the treasurer of the Railway Company for payment. It would then be paid or adjusted by the treasurer of the Railway Company when presented, but, of course, out of any such voucher or subsequent vouchers for coal furnished under the written lease and agreement there would be deducted by the treasurer of the Railway Company any sums which it had advanced, with interest on such advancement up to the day of settlement. If there was any balance left it would be paid over in cash to the Mount Carmel Coal Company; but if the Railway Company had advanced more money than would be covered by its voucher payable on the 15th day of the subsequent month, the difference or balance would be carried over to be charged against the invoices or vouchers for coal subsequently furnished and which the Mount Carmel Coal Company was obligated to furnish under the terms of the lease and agreement. (Rec., 77.)

On some occasions the Mount Carmel Coal Company would give an order in favor of some bank upon the Treasurer of the Railway Company to pay a note of the Mount Carmel Coal Company when due out of the specified voucher for coal which might become payable in the future as anticipated to the Mount Carmel Coal Company under the terms of the agreement. Such order would be filed by the Railway Company and at the request of the Mount Carmel Coal Company the note might be taken up by the Railway Company in order to enable the Mount Carmel Coal Company to secure from such bank other sums to meet its pay rolls, but such payments were made by the Railway Company for the Mount Carmel Coal Company with

the distinct understanding that they were to be regarded as advances in payment for coal which was to be furnished by the Mount Carmel Coal Company under the terms of the lease and contract. They were to be adjusted by the vouchers, or rather in settlement of the vouchers for coal so furnished. (Rec., 85.) No money would be repaid by the Coal Company to the Railway Company. There would be simply an adjustment of accounts under the contract.

The officers of the Railway Company knew, of course, that they would be safe in making such advancements in anticipation of its obligation to pay for coal delivered because they knew that on presentation of subsequent invoices of the Mount Carmel Coal Company for coal furnished under the agreement they could and would deduct in settlement therefor and out of the vouchers which would be issued by the Railway Company, a sum equivalent to such advances; and, if the Mount Carmel Coal Company should insist upon being paid again for the coal which was furnished, and should refuse to deliver more coal until it were paid again for coal which had theretofore been delivered and paid for, it was in the power of the Railway Company under the terms of the written agreement to give thirty days' notice and thus terminate the entire lease and agreement, or the Railway Company might treat such positive refusal as a repudiation of the existing arrangement or contract and rescind the same. We will give some extracts from Mr. Wellman's testimony throwing some light upon transactions involved:

"A. It was the custom of Mr. Devlin to ask advances.

Mr. Smith: Never mind about the custom. State what was said at the different times.

A. He asked for advances for pay roll purposes.

Q. Well, were those advances made from time to time by Mr. Wilder as Treasurer in response to his request?

A. They were in response to his request.

Q. How did he agree to satisfy those advances?

A. With voucher for coal.

Q. What do you mean by vouchers for coal?

A. His voucher represents the amount of coal furnished the Company from month to month." (Rec., 74.)

* * * * *

A. May 23, 1905, advance with interest was made on account of July voucher, which advance was made to aid in meeting pay rolls, the pay days being the second and fourth Saturdays each month, the second pay day of May would fall on May 27th. This advance was made May 23rd.

* * * * *

Q. Take the next item?

A. On July 3rd, the next item is $33,247.50, on July 3rd, advance with interest was made on account of July voucher, which advance was to assist in meeting pay rolls due July 24th. This payment was promised by E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to arrange with the American National Bank at Kansas City for pay roll purposes. (Rec., 75 and 76.)

* * * * *

Q. How do these credits come?

A. From his vouchers for coal.

* * * * *

Q. Who did Mr. Devlin apply to when he wanted these advances made, what officer of The Atchison, Topeka and Santa Fe Railway Company?

A. He applied to the Treasurer, Mr. Wilder. In his absence he applied to me. (Rec., 76.)

* * * * *

Q. Say during the time mentioned, during the year 1905, was the Mount Carmel Coal Company furnishing coal monthly to The Atchison, Topeka and Santa Fe Railway Company under these contracts stated in this petition?

A. They were, yes, sir.

* * * * *

Q. You have mentioned vouchers here. Explain how they were made?

A. The invoices for coal were sent to the Purchasing Agent for the current month.

Q. That is the Mount Carmel Coal Company would send them to the Purchasing Agent?

A. The Mount Carmel Coal Company would send them to the Purchasing Agent for voucher.

Q. These invoices show how much coal was delivered to The Atchison, Topeka and Santa Fe Railway Company?

A. For the current month. The Purchasing Agent would voucher covering invoices in his hands. By agreement the settlement was on the 15th day of the succeeding month. If there was any balance due Mr. Devlin we paid him. If there was any balance due us we charged it up against his next month's voucher for coal."

The Receivers then admitted that they were constantly selling the Santa Fe's coal in large amounts ever since they were qualified anywhere from $50,000.00 to $75,000.00 a month. (Rec., 77.)

On cross-examination he testified:

"Q. You had to buy coal of him right along—he was selling coal to you right straight along, and his coal bills amounted to more than his aggregated pay roll, didn't it?

A. No, sir.

Q. You mean to say he was just barely getting

enough out of his Mount Carmel Mine to meet his pay roll?

A. I mean to say that during the month of April there was a balance of $24,000.00.

Q. For all the coal now that he had sold you, you had paid him and had overpaid him about $24,000.00?

A. No, sir; he owed us.

Q. Certainly, you had overpaid him, he was owing coal he had not delivered you, $24,000.00?

A. Yes, sir. (Rec., 80.)

* * * * *

Q. Do you recall any other conversation that you had with Mr. Devlin with reference to this particular subject, now, or have you testified to the sum and substance of your recollection?

A. It was agreed that we should charge this up to the account." (Rec., 81.)

An account or statement of advances was attached to the intervening petition which was sworn to by Mr. Wilder. The first item stated in the account of $14,063.16 was the balance of an advancement of some $24,000.00 made in April, 1905, under the foregoing general arrangement and expected to be adjusted by the amount which would otherwise become payable May 15, 1905, but which subsequently proved insufficient. (Rec., 75.) Mr. Devlin also gave two drafts of $24,000.00 as a sort of security, which, however, were taken by the Treasurer of the Railway Company under protest and with the understanding that if not paid the adjustment would still be made out of or by the coal vouchers. One of these drafts for $10,000.00 was paid; the other remained unpaid, but it was plainly understood that the taking of these drafts would not be regarded as payment of advances or as changing the understanding that in any event the advances should

be liquidated or settled in the account for coal to be subsequently furnished under the contract. There was, therefore, left remaining prepaid on the contract on account of this advance, $14,063.16. (Rec., 79 and 80.)

The next advance set up in the account was made on May 23, 1905, amounting to $20,000.00, with interest amounting to $20,280.00, and was made on account or in anticipation of the usual vouchers for coal to be furnished by the Mount Carmel Coal Company in that month or following. This advancement was also made to aid the Mount Carmel Coal Company in meeting its pay rolls. (Rec., 75.)

The last advance, with interest amounting to $33,247.50 was made July 3, 1905, on account of or in anticipation of coal to be furnished under the contract by the Mount Carmel Coal Company in July or August and was also made to aid the Mount Carmel Coal Company in meeting its pay rolls. (Rec., 75.)

In this particular instance Mr. Devlin arranged for his pay roll purposes through the American National Bank of Kansas City and gave an order upon the Railway Company against his coal vouchers which was brought to the Treasurer of the Railway Company and filed. The Railway Company agreed to take up this note for the Mount Carmel Coal Company in order that it might arrange with the bank for further funds. This note was taken up by the Railway Company at the request of the Mount Carmel Coal Company and was held by it for surrender. (Rec., 76.)

It is true the Railway Company added interest upon these advancements from the date the same were made

until they were finally adjusted in the settlement of its vouchers for coal furnished under the agreement. Attempt was made in questions propounded to Mr. Wellman on cross-examination to show that the advances were intended merely as loans because the Railway Company charged up interest. The truth is that, in making these advances, it was merely discounting its obligation to make payments under the contract by anticipating its obligation which was to pay after the coal was furnished in any given month. It had the right to discount its obligation by charging something in the nature of interest. There was no agreement that the sums advanced should be repaid in kind but simply that the amount of such advances should be deducted from any sums which should thereafter become due from and payable by the Railway Company for coal which was furnished under the contract. The idea of a loan was not admitted by the witness and, of course, it does not express the true nature of the transaction.

Since the Mount Carmel Coal Company requested and assented thereto, it is obvious that the understanding under which these advancements were made and there was an allowance in the way of interest, was because such payments were made before the Railway Company was obligated to make the same under the strict terms of the agreement. To the extent that such advancements were made, the mode of performance of the obligation of the Railway Company was varied or modified from the strict letter of the written agreement, and to that extent but only of course in respect to such transactions actually had can it be said that

some provision of the written agreement had been modified. Of course, it was not claimed that the provision of the written contract in regard to time and manner of payment to be made by the Railway Company for coal to be furnished under the agreement was entirely modified for the balance of the term of the agreement; but it was simply contended that in reference to the particular advances or prepayments made, the provisions of the written contract by mutual consent of the parties interested were varied or departed from.

It will be observed that by the terms of the original lease and agreement (Rec., 22) the Railway Company was to make its payment "on or before the 15th day" of each succeeding month in which coal would be furnished. Of course it could not be compelled to make payment before the end of any such month, but the parties interested in this stipulation in the agreement had the right to vary it from time to time if they chose to do so. If, therefore, the Railway Company had until the 15th day of the following month to satisfy its obligation to pay, sound business reasoning would prevent it from paying the same before due without some consideration therefor, and that consideration was an allowance in the nature of "interest."

It is, therefore, apparent that at the date of the bankruptcy of the Mount Carmel Coal Company on July 7, 1905, the Railway Company had at the request of the Mount Carmel Coal Company anticipated payments which it would be obliged to make if the contract was to be further carried out to the extent of something over $57,000. *The Mount Carmel Coal Company un-*

der the contract was, of course, still obligated to deliver all the coal required by the Railway Company at the prices stated in the agreement. The performance of the Railway Company in respect to payments covered by these advances having, therefore, been somewhat varied by the parties thereto from that contemplated in the written contract, the Mount Carmel Coal Company could not again have demanded payment for any coal so prepaid which should be furnished under the contract because of its obligations thereunder. This was the status and situation of the lease and agreement at the time bankruptcy proceedings were instituted against the Mount Carmel Coal Company and when receivers in bankruptcy were appointed July 7, 1905.

The receivers in bankruptcy took charge of the mines of the Mount Carmel Coal Company, proceeded to operate under the lease and agreement, and continued to furnish the Railway Company with coal at the prices therein stated. They were very soon informed of the claim and contention of the Railway Company. Indeed it was their duty to ascertain the condition of the contract and the status of the accounts between the parties thereto. It is true that Mr. Leland testified in very general terms and in rather a misleading way, evidently referring to some suppositious independent and disconnected oral agreement, that he did not know of any verbal contract between the Railway Company and the Mount Carmel Coal Company by which the written contract had been modified, but he admitted also that he had not read even the written contract. He admitted that the mines of the Mount Carmel Coal Company operated under the lease were

a valuable asset of the estate. He was the only one of the receivers who took actual charge and supervision of the affairs of the Mount Carmel Coal Company. Shortly after he took possession he admits that the Railway Company made known to him its claim that it had made these advances in question and that it was entitled to be furnished with coal under the contract without being required to pay again for the same. This appears from the following extract from his testimony (Rec., 89):

"Q. Then of course you never undertook to assume any verbal contract and to turn over any coal pursuant to any verbal contract Mr. Devlin may have made with the Santa Fe?

A. No, I never knew of that. I might mention this: It may have been some time in *August*, some time quite awhile after we had charge, when we wished the Santa Fe to advance so much money on account of paying our payrolls in different mines in Kansas, was the first I knew there was any hitch anywhere. Mr. Hurley was away and Mr. Wilder had instructions from Chicago that they *could not advance money unless the back was paid for, some former advances made.* I went up to Mr. Wilder's office to wire Mr. Hurley, next day was pay day. They said he had just got back. Mr. Copeland and I explained it to Mr. Hurley and Mr. Hurley said 'we must pay tomorrow.' That money was sent, was deposited by the Santa Fe to the National Bank, Pittsburg, Kansas, subject to the order of our manager, to pay the miners next day. Always afterwards, I receipted for this money, *sort of a receipt whereby they did not waive any rights.* I did that thinking it did not make any difference as receivers, as far as I was concerned.

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged

verbal agreement Mr. Devlin is supposed to have made prior to the receivership?

A. I never knew anything about it.

Q. Since the claim you never undertook to carry it out?

A. I never knew anything about it. *I understand they claimed they advanced money for the coal, and they had a right to the payment.*"

As to the testimony of Mr. Reeves, co-receiver, it is simply necessary to say that he paid no attention to the receivership of the Mount Carmel Coal Company. He did not even know that the properties were being operated in pursuance of a written lease and agreement—notwithstanding the report signed by him. He did understand, however, that the Railway Company was claiming that it had made advances and that it was insisting that these advances should be recognized if the receivers continued to furnish coal. (Rec., 90 and 91.) In any event it is manifest from the schedule filed by the receivers that they knew that the rights of the Mount Carmel Coal Company, bankrupt, were only such as existed undert the lease and contract. On Rec., p. 11, is found the following statement in their report:

> "This company" (referring to the Mount Carmel Coal Company) "owns no real estate or coal deposits, but is simply an operating company, which has for eight years past *worked under contracts and leases with the Atchison, Topeka and Santa Fe Railway Company, and said Railway Company's affiliated Coal Companies,—the Cherokee & Pittsburg Coal and Mining Company and the Osage Carbon Company. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies,* and from coal deposits owned jointly by the said Cherokee Company and Craw-

ford County Coal Company. Coal is also being mined through shaft No. 9 from lands owned by the Devlin-Miller Coal Company.

Said agreements permitted the Mount Carmel Coal Company to use the mining facilities and equipment owned by the Cherokee and Osage companies in connection with the then existing shafts, likewise the use in new shafts of parts removed from shafts dismantled; and provided that all new shafts in other respects should be opened and equipped at the expense of the Mount Carmel Coal Company."

As the receivers refused to recognize or admit the claim of the Railway Company arising out of these advancements and its right to have the coal furnished according to the terms of the written contract without being again required to pay for so much as had been paid for by these advances, and after repeated and fruitless efforts to secure an adjustment without litigation, the Railway Company thereupon in connection with the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company gave notice on November 1, 1905, that they would ask leave to file and in the same month did file their intervening petition, which, although hastily prepared, very plainly set up the claim of the Railway Company in respect to the advancements which it had made, attaching copies of the written agreements referred to, and that such advancements were in a sense a modification of the written lease or agreemnt to the extent that the same had been made and that by reason of such advances and the understanding in respect thereto, it was entitled to have delivered to it coal under the terms of the contract to the extent of such advancements without being required to pay again for the same. It asked

the court sitting as a court of equity to direct the receivers either to allow the claim of the Railway Company in the adjustment of accounts for coal furnished or to surrender up the leased premises and the agreement. (Rec., 33 to 70.) In other words, it was an application that the receivers in bankruptcy and the Bankruptcy Court elect whether to continue the assumption of the lease and agreement subject to the modification or variation ingrafted thereon by the oral arrangement resulting in the advancements in question, or, if they did not elect to assume the agreement in the condition it was in the hands of the bankrupt, then the same and the leased premises should be surrendered up to the Railway Company upon it or its affiliated companies making settlement for improvements made by the Mount Carmel Coal Company as provided in the written agreement.

If the receivers were not prior to this time fully advised as to the claim and contention of the Railway Company, not only they but also the Bankruptcy Court had full advice as to the nature of this claim upon the filing of the intervening petition and upon the hearing of testimony in respect to the same. Certainly it was obligatory upon the court at that stage of the case to direct the receivers or trustees to promptly make their election.

Our position was virtually admitted in the brief filed in the Circuit Court of Appeals by Mr. Dean on behalf of the trustees in which he stated on pages 3 and 4 thereof as follows:

> "It should be remembered that while the various sums of money thus paid by the Railway Company to the Mount Carmel Coal Company prior to the

date fixed for the payment by the terms of the contract were called advances, and were technically advances, nevertheless, in almost all instances the coal for which the so-called advanced payments were made was delivered to the Railway Company at the time of such advancements, since the deliveries were being made every day by the Mount Carmel Coal Company to the Railway Company."

(The latter, of course, is a slight misstatement because it is plain that coal was not furnished sufficient to meet the advancements.)

"On July, 7, 1905, the Mount Carmel Coal Company was adjudicated a bankrupt, and the appellees were on that day appointed receivers to carry on the business of the company, and in the capacity of receivers and trustees of said bankrupt *continued the business until the expiration of the contracts of lease.* At the date of the adjudication in bankruptcy, it appears that the Railway Company had advanced to the bankrupt the sum of $57,304.16 in excess of the value of coal delivered to it up to that date. * * *

"The receivers continued to deliver to the Railway Company after their appointment, the same as had been done by the Mount Carmel Coal Company before its bankruptcy, at the same schedule of prices. When the Railway Company were asked to settle with the receivers for coal delivered to it by them, it withheld from the amount due to the receivers the amount which the Railway Company had advanced to the Mount Carmel Coal Company previous to its bankruptcy, and this controversy arises out of that fact.

"It might be stated as a fair inference from the evidence in this case that when the Mount Carmel Coal Company secured advances from the Railway Company it promised that the amount of money so advanced might be deducted by the Railway Company from the amount of bills to be rendered by the Mount Carmel Coal Company against

> the Railway Company for coal already sold and delivered to it, or to be sold and delivered to it in the future."

It is evident from the opinion of the referee who heard the testimony and of the district judge reviewing such opinion that they each entirely misconceived the nature of the claim of the Railway Company. They each treated the oral arrangements covering the advances in question as entirely separate, distinct and independent of the written contract and in no sense in any manner varying or affecting the same. The referee stated in his opinion that he was unable to find testimony to modify the written lease, that there was no *express* oral agreement to that effect. He did state, however, that it was true that the advances were to be paid by moneys due the Coal Company for coal furnished the Atchison Company and that the money instead of being paid under the terms of written contract would be kept to reimburse the Railway Company for money advanced. (Rec., 31.) (There was of course no understanding that any money advanced should be repaid.) But he continued:

> *"But this amounts to the same thing as saying that the the Santa Fe Company merely paid for its coal in advance although not required to do so by the terms of the contract."* (Rec., 31.)

That is just what we are contending. On page 25 the referee also stated after referring to the written lease and agreement:

> "The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its payrolls were to be paid by the delivery of coal *under the terms of the lease above referred to."*

The District Judge in his opinion treated the arrangement in respect to these advances in the same manner but as of no more legal significance or effect than had a bank or some stranger to the lease and agreement furnished the money and taken the obligation of the bankrupt to repay within a certain time with interest. (Rec., 109.)

The referee erred in concluding that there was no express modification or variation of the written lease and agreement merely because the parties had not in set terms or formal language expressed an intention to effectuate such a result.

The referee and the district judge in treating the various verbal transactions or arrangements covering the advances in question as being entirely separate and independent and in nowise connected with the written lease and agreement overlooked and ignored an obvious fact which would be apparent to anyone who would place himself in the position of the contracting parties.

The important fact is that there was then in effect a contract by which the Mount Carmel Coal Company was obliged under its terms to furnish the Railway Company with all coal required by it for its daily uses at prices stated or determined; that the Railway Company, in view of those existing obligations and instead of waiting to make its payments or perform its part of the contract upon the 15*th day following each month, at the express request in each instance of the Mount Carmel Coal Company made, as found by the referee, its payments by furnishing its money in advance and thereby performed its part of the undertaking in the*

particular instances specified at a date prior to the time it was legally required so to do.

The agreement was not that the Mount Carmel Coal Company should furnish any other or different coal than that it was obligated to furnish under the written lease and agreement. The prices paid for such coal remained unaffected. The only variation from the strict and literal terms of the contract was that the Railway Company at the special instance and request of the other contracting party prepaid for certain amounts of coal which such other party would have to furnish under the written agreement. *It was not necessary for the Railway Company to exact from the Mount Carmel Coal Company an independent or collateral undertaking that it would furnish coal to such extent because it was already obligated under its contract to do that and more.* The understanding was that the advancements should be adjusted at the end of each month in the accounts between the parties after the coal was furnished in accordance with the agreement. It is, therefore, obvious that the strict manner of performance by the respective parties in respect to pay to be made by the Railway Company and received by the Mount Carmel Company as specified in the written contract was varied or modified to the extent that such advancements had been made. To the extent, therefore, and in the particulars that the Railway Company at the request of the Mount Carmel Coal Company had performed in advance of the time it was required to under the strict terms of the agreement, to that extent only and in those particulars, by the agreement of the parties to the contract, the written agreement may be said to have been varied or modified.

The Circuit Court of Appeals speaking of these verbal arrangements and their connection with the written agreement said on page 125:

> "It was not, in our opinion, a modification of any of the *substantive* provisions of the contract, but was a change rendered necessary by subsequent events *in the method of its execution only.* It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution. The contract after the new arrangement remained as before. The Coal Company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the Railway Company as before. The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract."

Some reference is made on page 43 of opponent's brief to a provision in the contract requiring the Mount Carmel Coal Company to give a bond of $100,000 for its faithful performance of its covenants as showing the improbability of the oral arrangement—however that may appear. There is nothing to show that any such bond was in effect at the time, but if there was, we believe anyone would know that it would not cover a case where the strict letter of the written contract had been varied or the mode of performance modified. However, there can be no dispute as to the facts. There was no conflict in the evidence.

Again, it is stated, as a matter of prejudice to the Railway Company's contention, that both Mr. Devlin and Mr. Wilder had died before the hearing. However, Mr. Wellman, the assistant treasurer of the Railway Company, was thoroughly cognizant of the

transactions and the nature and purpose of the same. Moreover, it appears from the record that the intervening petition was sworn to by Mr. Wilder, that the receivers first filed a demurrer to the same, but upon his death they withdrew this demurrer and filed an answer in general terms denying the allegations of the intervening petition. Had they acted in good faith they would have expedited the hearing as they could have done and we might then have had Mr. Wilder's testimony in the record in addition to that of Mr. Wellman. The fault of such omission is their own.

Before this cause could be reached for argument in the Circuit Court of Appeals which was in December, 1906, it became apparent that the term of the lease and agreement had expired, namely, on June 1, 1906, and, therefore, as under the changed circumstances that court could not grant the alternative relief of requiring a surrender up of the lease and contract by the trustees, there was nothing for it to consider except the right or claim of the Railway Company to be allowed for these advancements out of the bankrupt estate inasmuch as it was admitted in the argument and in the brief filed on behalf of the trustees that they had continued to operate under the lease and agreement and had received all the benefits thereunder up to the date of such expiration. As stated in their brief filed in that court: "in the capacity of receivers and trustees of said bankrupt (they) continued the business until the expiration of the contracts of lease."

It is now charged that the Railway Company was derelict in not having the cause advanced and determined in the Circuit Court of Appeals before the ex-

piration of the lease and agreement. It is apparent that we could not have had it expedited in time to accomplish such a result. There was no ground upon which we could move that this cause should be heard over other litigation as important. The trustees in bankruptcy, however, were in position to have had the cause advanced had they desired to do so. They might have claimed that an early decision was necessary to enable them to close up the bankrupt estate. Being, however, in possession under the lease and agreement and enjoying all of its benefits, they preferred in a high-handed and arbitrary manner to continue therein under the protection of the bankruptcy court, to the detriment of the rights of the Railway Company. We respectfully submit that our rights could not be prejudiced by the error and wrongful act of the bankruptcy court and its trustees in refusing to make an election in due time when requested or to deal equitably and fairly with the Railway Company. The result of all is that the action of the trustees and of the bankruptcy court was to assume for the benefit of general creditors and of the bankrupt estate an executory contract, and at the same time attempt to thrust and impose upon the Railway Company, the other party thereto, an entirely different arrangement or agreement than that which existed between the parties thereto at the date of the bankruptcy. In other words, the District Court evidently held that general creditors of a bankrupt obtained greater rights under executory contracts of such bankrupt than the bankrupt himself might have asserted.

ARGUMENT.

(A) ON THE MOTION TO DISMISS.

It is contended that the appeal to this court was had under the Act of March 3, 1891, although the appeal was taken within thirty days under the rule of this court and apparently under the Bankrupt Act. Of course, no appeal would lie to this court from a judgment or decree allowing a claim as preferential or as a lien upon property which was being administered in the Bankruptcy Court in a bankruptcy proceeding. The jurisdiction of this court was plainly limited in Section 25b of the Bankruptcy Act as follows:

> "From any final decision of a Court of Appeals allowing or rejecting a claim under this Act an appeal may be had under such rules, within such time as may be prescribed by the Supreme Court of the United States in *the following cases and no other*," etc.

The appeal in question is from a *final decision* of the Circuit Court of Appeals *allowing a claim* of the Railway Company under the Bankruptcy Act, for it was not allowed under any other act. It was at all times claimed by the Railway Company that the advancements made by it to the bankrupt prior to the bankruptcy, were charges in favor of the Railway Company upon the lease and agreement which had been seized and was being administered by the receivers in bankruptcy as property of the bankrupt, and that such claim should be allowed by the receivers as a burden or charge upon the agreement or such agreement

should be surrendered up by them. When the case was reached for hearing in the Circuit Court of Appeals we insisted in the brief and argument that, as the alternative relief could not be granted (the contract having expired as was apparent from the record), that there was nothing left for the Circuit Court of Appeals to decide and determine but the right of the Railway Company to have its advances allowed as a charge against the trustees in bankruptcy and a charge upon the bankrupt estate, a great part of which consisted of profits and property derived under the lease and agreement. The fact that the trustees and the bankrupt estate had had the full benefit of the lease and agreement up to the date of expiration was admitted and there was nothing left for the Circuit Court of Appeals to do, as we shall show hereafter in the argument on the merits, but to allow the claim of the Railway Company as it did. It was allowed as a claim entitled to be paid out of the bankrupt estate before the claims of general creditors. It was allowed because it was an equitable charge upon the contract which was seized by the receivers in bankruptcy as property of the bankrupt.

The case is similar to that disposed of in the memorandum decision of this court in *Savings Deposit Bank & Trust Company of Elyria, Ohio, Appellant*, v. *Nathan Loeser, Trustee of the Estate of Cassie L. Chadwick, Bankrupt*, 209 U. S., 542, in which there was an appeal from a decision of the Circuit Court of Appeals, Sixth Circuit, reversing a decree of a Bankruptcy Court allowing a chattel mortgage as a lien upon certain property of the bankrupt. The appeal to this

court was dismissed for want of jurisdiction, citing *Chapman* v. *Bowen*, 207 U. S., 89; *Bank* v. *Klug*, 186 U. S., 202, and General Order XXXVI. As to the nature of the appeal in that case see *Loeser* v. *Savings Deposit Bank & Trust Co.*, 163 Fed., 212.

As the purpose of the bankrupt law was to expedite the settlement of bankrupt estates and, therefore, appeals in respect to claims upon the property of the bankrupt so that such estates might be settled expeditiously, it cannot be assumed that it was intended by any provision of the bankrupt law that the slow method of appeals provided for in the Act of 1891 should govern, particularly in respect to cases specially provided for in the Bankrupt Act for appeals to this court.

In addition to authorities heretofore cited upon this motion we call attention to *Kizer* v. *Texarkana & Ft. Smith Railway Company*, 179 U. S., 199, showing there was no Federal question set up in this case by the trustees within the requirement of Subdivision 1, Section 25b of the Bankrupt Act. See also *Hulbert* v. *Chicago*, 202 U. S., 275, 280.

It is strenuously urged and reiterated a dozen or more times in opponent's brief, apparently for the purpose of creating some prejudice, that in the opinion of the district judge in disposing of the case before him it is expressly stated by him (Rec., 107): "any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed," and it is solemnly asserted that we took no exceptions and made no assignment of error in respect to such statement. We

respectfully suggest that we have not been advised of any statute or practice which makes the *opinion*, whether written or oral, of a bankruptcy judge in disposing of a matter before him, a part of the record. The opinion of a court in disposing of a case does not become a part of the record in the case. We understand, and our learned opponents understand, that an exception taken to any statement merely found in the opinion of a court would have no legal effect and that no error could be predicated thereon and, therefore, a lawyer familiar with the practice would not think of assigning error thereon. We believe our opponents know better and we need but call attention to the ruling of this court in *Chapman* v. *Bowen*, *supra*, that such opinion is not a part of the record. The district judge obviously did not understand our position or contention. It is true that our claim then was not, that the advances made by the Railway Company were absolutely entitled to be paid as a preference out of the general estate of the bankrupt until and unless there was an assumption of the lease; but that if the trustees elected to assume the lease and agreement they were bound to recognize and satisfy this claim as a charge thereon or a variation thereof and that they should do one or the other thing, and, of course, if they continued to enjoy the benefits of the contract they were bound to discharge the burdens thereon and allow the claim.

The referee in his report (Rec., 31 and 32) stated:

> "Although there are equities in favor of petitioner's claim by reason of having advanced money to meet payrolls and keep the Mount Carmel Coal Company a going concern, I can find nothing in

the law which will justify the court in giving the claim priority over those of other creditors."

This shows that the referee understood there was some such claim made by the Railway Company .

The case of *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, cited by our opponents, is hardly in point, as in the intervening petition filed in the bankruptcy proceedings there the owner of certain machines demanded possession thereof as such owner under a title adverse to the bankrupt estate. No motion was made to dismiss the appeal, nor does the jurisdiction of this court appear to have been challenged. The appeal in the present case is rather analogous to that had in the case of *Savings Deposit Bank & Trust Company of Elyria, Ohio*, v. *Loeser, supra.*

Had the Circuit Court of Appeals been requested to make its findings of fact it would have stated no doubt the admissions made in the arguments and briefs before it showing that its judgment or decree was in all respects warranted. There is no reason why these findings could not have been requested by the attorney for the trustees in this as in any other case affecting a decision concerning the allowance of a claim as preferential or otherwise in bankruptcy proceedings. He knew there was then only one question remaining to be decided in the case, that is whether the claim became preferential or a charge. As the judgment of the Court of Appeals would not become final until the end of the term he could, if surprised, have had any formal entry thereof set aside, in order that findings might be made, had he requested the same. No such suggestion was ever made to that court.

(B) ON THE MERITS.

I.

BY ADVANCING OR PREPAYING AT THE REQUEST OF THE MOUNT CARMEL COAL COMPANY FOR COAL WHICH THAT COMPANY WAS OBLIGED TO FURNISH UNDER THE WRITTEN LEASE AND AGREEMENT THAT COMPANY AND THE RAILWAY COMPANY TO THAT EXTENT AND IN THAT PARTICULAR VARIED OR MODIFIED THE MODE OF PERFORMANCE REQUIRED OF THE RAILWAY COMPANY BY THE WRITTEN CONTRACT AND MODIFIED OR VARIED ITS TERMS SO FAR AS APPLICABLE TO COAL SO PAID IN ADVANCE. THAT, AS CONTRACTING PARTIES, THEY HAD THE LAWFUL RIGHT TO DO AND STRANGERS TO THE CONTRACT ARE IN NO POSITION TO QUESTION WHAT WAS DONE.

The referee seemed to think that there was no "*express*" agreement to modify the written lease and agreement, and the District Court seemed to think there could be no modification of the terms of a contract operative only for or during a limited period or in respect to certain matters arising thereunder unless the modification and variation entirely changed some express stipulation and was effective for the balance of the term of the agreement.

Both views are incorrect. Parties to a stipulation in a contract have the same power to modify the same, change the mode of performance, waive conditions or prescribe others in their places as they have to make an original agreement. General creditors of either are not parties to the executory contracts of their debtors and have no right to question any change or alteration in the same or any *settlements* made thereunder.

Parties to an agreement may entirely abrogate the existing arrangements and general creditors could not claim to be prejudiced thereby as they have no interest or voice in the execution of such contracts. The modification or variation agreed upon may only extend to a limited performance of or to certain special matters arising in the performance of the agreement and in such respects only modify or vary such agreement. It need not be expressed in any set phraseology or according to any formula. A modification or a variation like an original undertaking may be proved by the acts and dealings of the parties. Juries are constantly called upon to determine what are the terms of oral arrangements from evidence of what the parties in fact have done, as well as of what was said by them.

In this commercial age where freedom to contract has been fully recognized, the courts have endeavored by all reasonable means to ascertain the intent of the parties, and when such intent has been ascertained, it is the duty of the court to enforce it if not unlawful.

In referring to what are known as implied contracts, as contradistinguished from constructive contracts, and the terms of which are shown by the acts and dealings of parties, it is said in I Parsons on Contracts, 9th Ed., star pages 4 and 5:

> "These contracts form the warp and woof of actual life. If they were wholly disregarded, the movement of society would be arrested; and in so far as they are disregarded that movement is impeded or disordered."

Even in formal written contracts parties seldom fully express all the terms thereof, and courts are

called upon frequently to supply some undertaking which it is apparent the parties intended from the agreement itself and the situation in which the contracting parties were at the time.

In *Youngberg* v. *Lamberton*, 91 Minn., 100, (97 N. W., 571), the Supreme Court of Minnesota said, on page 572:

> "Neither can it be doubted that it was competent for the parties to the written agreement to change or modify the same, and by new conditions, not in writing, waive, dissolve, or annul the original contract, or to add to or qualify its terms, so as to be valid and binding upon the parties. *Goss* v. *Nugent*, 5 B. & A., 64; *Delaney* v. *Linder*, 22 Neb., 274, 34 N. W., 630; *Lynch* v. *Henry*, 75 Wis., 631, 44 N. W., 837; *McCreery* v. *Day*, 119 N. Y., 1, 23 N. E., 198, 6 L. R. A., 503, 16 Am. St. Rep., 793. * * *
>
> "This testimony tended to show that reciprocal rights were granted and concessions made by each of the parties in the modification of the original agreement, and were acquiesced in by each; hence upon the verdict of the jury the new contract though resting partly upon the original stipulations and partly upon parol changes, must be regarded as their final determinative convention concerning all matters between the parties. *Siebert* v. *Leonard*, 17 Minn., 436 (Gil. 410); *McClay* v. *Gluck*, 41 Minn., 193, 42 N. W., 875; *King* v. *Duluth Ry. Co.*, 61 Minn., 482, 63 N. W., 1105."

So, in *Teal* v. *Bilby*, 123 U. S., 578, it is said:

> "It is hardly pretended by counsel for plaintiffs that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract *in regard to some parts of it, which to that extent should be a substitute for the first one.*"

In *Bryant, Admr.* v. *Stephens et al.*, 58 Ala., 636, a party gave his promissory note for the excess on an exchange of lands, and subsequently gave two notes with the recital on each that "the consideration for which this note is given is the following described lands lying in Coffee County," the land being the same as that upon which the original note was given. Held, that the contract evidenced by the original note was altered by the giving of the subsequent notes.

In *Holman & Woods* v. *The Georgia R. R.*, 67 Ga., 595, where by the terms of a written contract wheat was made deliverable by one of the parties only to the order of the other, endorsed on the elevator receipt given for it, yet it was still held that with the consent of both parties this could be changed by subsequent agreement, and the wheat delivered without such endorsement.

In *Cline* v. *Shell*, 43 Oregon, 372 (73 Pac., 12), it was held that a provision in a building contract requiring the contractor to furnish hardware was modified by the owners purchasing it in the presence and with the consent of the contractor, and requesting the seller to charge it to him.

In *Hull* v. *Pitrat*, 45 Fed., 94, a written contract between parties was held subsequently modified by their acts and dealings. On page 103 the language of Judge Swayne, in *Railroad Co.* v. *Trimble*, 10 Wall., 376, 383, is quoted with approval:

> "The most solemn contracts under seal, where the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties."

In *Phoenix Mutual Life Ins. Co.* v. *Hinesley,* 75 Indiana, 1, it was held that a provision in an insurance policy requiring payment of an annual premium on or before a given day in each year might be shown to be modified or changed by the conduct and dealings of the parties thereto, and that such annual premium should not become payable until the appellant had given the appellee notice thereof, and of the amount of payment, after deducting the annual dividend.

In *Prudential Ins. Co.* v. *Sullivan,* 27 Ind. App., 30, (59 N. E., 873), in a suit on a policy of insurance an oral agreement between insurer and insured was admitted showing that the payment of the premium which was to be in advance was waived by the insurer and it was held that such waiver might be shown by parol.

See, also,

II Page on Contracts, 608.

1 Greenleaf on Evidence (16th Ed.), Sec. 304.

It is evident from the testimony that the transactions between the Railway Company and the Mount Carmel Coal Company were understood and intended by the parties as a variation or modification in the mode of performance of the written stipulations in the agreement to the extent that the advances were made by the Railway Company. *The Railway Company was not making such advances to the Mount Carmel Company on the general credit of that company, but in view of and upon the strength of the contract obligation of the Mount Carmel Company to furnish the Railway Company with coal at the prices stated in the written agreement.*

Instead of paying, after a certain amount of coal had been delivered, upon the 15th day of each following month, the mode of performance in respect to the Railway Company, but in respect only to the particular advances, was by consent changed, and the Railway Company paid in advance for a certain amount. This arrangement was made in view of the contractual relations between the parties, as evidenced by the written contract, and it must be assumed that the advances were made on the faith of and in reliance upon the contract obligation of the Mount Carmel Company to furnish coal.

In *Carr* v. *Hamilton*, 129 U. S., 252, it was held that where a holder of a life policy borrows money of his insurer, it will be presumed *prima facie* that he does so on the faith of the insurance and in expectation of possibly meeting his obligation to the company by that of the company to him. In that case the Life Insurance Company became insolvent and went into liquidation. The amount due on an endowment policy payable in any event at a fixed time, and sooner if the party died before that time, it was held, should in settling the company's affairs be set off against the amount due on a mortgage deed from the holder of a policy to the company by way of compensation or reconvention.

On page 262 it is said:

> "We are inclined to the view that where a holder of a life policy borrows money of his insurer, it will be presumed, *prima facie*, that he does so on the faith of the insurance and in expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credit, and entitled

to the privilege of compensation or setoff whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company."

That the true intent of parties to any arrangement must be viewed from the standpoint of the parties themselves, the situation in which they were, the surrounding conditions and their respective existing obligations was applied by this court in *Fourth Street Bank* v. *Yardley*, 165 U. S., 634. On page 650 it was said:

> "In the light of these principles we proceed to consider the facts certified, in order to ascertain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund, or to give a lien or charge thereon, or whether, if not express, *such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings and the attendant circumstances.*"

On page 651 the court continued:

> "When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties," etc.

Further on it is said:

> "The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without the reference to and assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt."

That case is pertinent also upon the equities of the case at bar.

In *Jennings* v. *Bank of California*, 79 Cal., 323 (21 Pac., 852), it was held that a bank was entitled to an equitable lien against a certificate of stock for advances made to a holder thereof until it had notice of a transfer, and it was also held that a contract for an equitable lien was to be inferred or implied from the conduct and dealings of the parties.

The advancements made by the Railway Company were to be adjusted as had been done in the past, in accordance with the prices fixed in the written contract for the coal furnished thereunder, showing very plainly that the parties understood, that their dealings were had in view of the written contract obligations and as a change in the mode of performance to the extent that prepayments or advances were being made by the Railway Company for the coal which the Coal Company was obligated to furnish it under the terms of the lease and agreement which was afterwards assumed by the receivers and trustees in bankruptcy.

See *Stelling* v. *Jones Lumber Co.*, 116 Fed., 261, 266 and 267 (C. C. A., 7th Cir), where there was a contract for the manufacture and sale of lumber and the purchaser to enable the vendor to continue business furnished the latter large amounts of money, the court held such sums were advanced under the agreement and for the purchase price of lumber to be furnished.

II.

IF THE ASSENT OF THE OSAGE CARBON COMPANY AND THE CHEROKEE AND PITTSBURG COAL & MINING COMPANY WAS NECESSARY TO SUCH VARIATION FROM OR MODIFICATION OF THE WRITTEN LEASE AND AGREEMENT THE SAME WAS GIVEN. HOWEVER SUCH ASSENT WAS NOT NECESSARY AS THE CHANGE ONLY AFFECTED A STIPULATION BETWEEN THE RAILWAY COMPANY AND THE MOUNT CARMEL COAL COMPANY.

It is dolefully contended that the modification or variation from the written contract by reason of the verbal arrangements in question was inoperative because the other parties to the lease and agreement, the Osage and Cherokee companies, had not assented to the same. (They are not complaining on account thereof.) No such contention was made at any time either before the Referee or the District Court. If such assent were necessary it is shown to have been given or the modification acquiesced in by the companies in question joining the Railway Company in the intervening petition asking relief on account thereof. No objection was ever made by these companies on account thereof. They were affiliated with the Railway Company. No express assent on their part was necessary. The stipulation in the written lease and agreement which was varied from was one only between the Railway Company and the Mount Carmel Company. It concerned them alone. It only affected the mode of performance on behalf of the Railway Company and was beneficial to the Mount Carmel Company as it was made at its request. Neither it nor its assignees

could now charge that the oral arrangement was inoperative to modify the relations and situation between the parties. The point made by our opponents is simply lugubrious.

III.

THE VERBAL ARRANGEMENT WAS NOT WITHIN THE STATUTE OF FRAUDS AS ALLEGED IN THE AMENDED ANSWER OF THE TRUSTEES.

The trustees filed an amended answer to the intervening petition in which they set up: (1) a general denial of the averments in the petition; (2) a denial that the verbal contract set forth in the petition was a modification of the written lease or contracts but alleged that *if* made at all it was an entirely independent contract; and, (3) that the verbal contract as a modification of the written lease would be within the statute of Frauds of the State of Kansas and void. (Rec., 72.)

The second and third defenses it will be seen are purely argumentative and not good pleas.

However, the section of the Kansas Statute of Frauds and Perjuries which was called to the attention of the lower court, but without much insistence on behalf of the trustees, and which is now relied upon, is section 5, page 674, General Statutes of Kansas, 1901, by Dassler, reading as follows:

> "Sec. 5. No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be *assigned or granted*, unless it be by deed or note in writing, *signed by the party so assigning or granting the same*, or

their agents thereunto lawfully authorized by writing, or by act and operation of law."

It is claimed that as the written agreement was for an interest in lands exceeding one year in duration it was required to be in writing and there could be no verbal modification of the same. In the first place it will be observed that the above section only provides that no lease, estate or interest in lands shall be "*assigned or granted*," except by deed or note, in writing, "*signed by the party granting the same*." Such a provision does not require, for instance that the undertaking of the lessee be in writing. Thus in *Santa Fe Railroad Company* v. *English*, 38 Kansas, 110, it was held that the consideration for lands sold and deeded might be shown to be an oral promise of the grantee not in writing, such as an agreement to give a life pass. The construction of that court is conclusive.

Neither does the statute in question require the incidental undertaking between the Railway Company and the Mount Carmel Company, the so-called lessee, in regard to furnishing and paying for coal, to be in writing; so that the arrangement whereby the Atchison Company made its advances was not one which fell within the above section, or which by the statutes of Kansas was required to be in writing.

In the next place, the arrangement in question referred only to the mode of performance under the agreement. At the request of the Mount Carmel Company the Atchison Company had performed, by making payments to the extent specified, at a date prior to the time it was obligated to do so under the written agreement, and the Mount Carmel Company received the full benefit of that performance.

It is not contrary to any provision of the Statute of Frauds of Kansas for parties, even to a written contract which that statute requires to be in writing, to dispense with or change the mode of performance thereunder by either party; and it would be a fraud to permit one of the parties who had received the benefit of the substituted or changed performance to set up the statute, or claim that the arrangement was invalid because not in writing, when the statute does not plainly so provide. It has been said in a number of instances that such statutes were not intended to assist in the perpetration of fraud.

The obligations of the Mount Carmel Company under the written contract were not at all changed by this arrangement. Such arrangement contemplated the continued existence of the written obligation of the Mount Carmel Company to furnish to the Railway Company coal required by it. The Railway Company satisfied its obligation to make certain payments under the written contract by making equivalent advances.

It is said in II Coke upon Littleton, Butler & Hargreaves Notes, Sec. 343, page 21b:

> "And so it is if the money is to be paid on such a day, yet if the money be tendered and received at any time before the day, it is sufficient."

In *Cummings & Others* v. *Arnold & Another*, 3 Metcalf Reports, 486, it was held that the terms of a written contract for the sale of goods may be varied by a subsequent parol contract, though the original contract falls within the operation of the Statute of Frauds. That was a suit for breach of a written contract to manufacture and deliver weekly to the plain-

tiff a certain quantity of cloth at a certain price per yard on eight month's credit. It was held that the defendant might give in evidence, as a good defense, a subsequent parol agreement between him and the plaintiff, made on a legal consideration, by which the terms of payment were varied, and that the plaintiff had refused to perform the parol agreement. On page 489 the court quotes with approval the following language of Lord Denman, in *Goss* v. *Lord Nugent*, 5 Barn. & Adolph, 65, as a well established principle:

> "After the agreement had been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left to the written agreement."

On page 491 the court continues:

> "The statute (referring to the Statute of Frauds) therefore requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts."

The case of *Cuff* v. *Penn.*, 1 M. & S., 21, is cited with approval.

In *Stearns* v. *Hall*, 9 Cush., 31, it was held that evidence was admissible to show that the time of per-

formance of a written contract within the Statute of Frauds had been enlarged by a subsequent oral agreement.

In *McCombs* v. *McKennan*, 2 Watts & Searg., 216, it was held that a parol agreement by one party to a covenant, to waive the performance of a certain part of the covenant by another party, is not such an alteration of the contract as will render necessary a change in the form of action upon it.

In the opinion it is said, on page 218:

> "If a party agrees to accept the thing to be delivered at another time or place than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. It imposes no new duty upon the defendant; he merely accepts as performance by the plaintiff that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same."

In *Negley* v. *Jeffers et al.*, 28 Ohio St., 90, it was held that when a deed to real estate had been executed, or title in any other way passed, subsequent agreements between vendor and vendee, as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase money becomes due, are not affected by the Statute of Frauds; that a subsequent agreement between the parties by the terms of which the vendee agreed to waive his right to insist on the performance of such conditions precedent, and take the property subject to the encumbrances, and pay the balance due, was not a contract within the Statute of Frauds, and might be proved by parol. See pages 99, 100 and 101.

In support of the foregoing, see also

Lee v. *Hawks*, 68 Miss., 699 (9 Southern, 828).
Long v. *Hartwell, Admr.*, 34 N. J. L., 116.
Jackson et al. v. *Litch*, 62 Pa. St., 451.
Leathercloth Co. v. *Hieronimus Co., L. R.*, 10 Q. B. 140 (1875).
Fleming v. *Gilbert*, 3 Johnson's Rep., 528.

Again, the Mount Carmel Coal Company obtained the entire benefit of the oral agreements, and the same were completely performed on the part of the Railway Company. It would be a fraud now to permit the Mount Carmel Company or its assignee to repudiate this arrangement or claim the same to be invalid, as it has had the full benefit thereof.

29 Am. Enc. of Law, 2nd Ed., page 832.

It is contended that proof of the oral arrangement to take it out of the statute must be clear, definite and conclusive; and must show a contract leaving no *jus deliberandi* or *locus poenitentiae*. If that were correct and applicable, yet there was no dispute at all under the evidence that the advances were made on account of coal which was to be furnished under the agreement. The testimony was conclusive. As the advancements had in fact been made there was, of course, no opportunity left for a *jus deliberandi* or *locus poenitentiae*.

The agreement, however, was not within the statute.

IV.

AN ASSIGNEE OF ONE OF THE PARTIES TO A CONTRACT IN SEEKING THE BENEFITS OF ITS FURTHER EXECUTION BECOMES SUBSTITUTED IN THE PLACE AND STEAD OF HIS ASSIGNOR THEREIN AND HIS RIGHT TO THE BENEFITS AND FURTHER PERFORMANCE THEREOF IS SUBJECT TO CHANGES, MODIFICATIONS, VARIATIONS AND ADJUSTMENTS MADE THEREUNDER BY THE PARTIES THERETO PRIOR TO NOTICE OF THE ASSIGNMENT AND ALSO TO ALL EQUITIES WHICH HAD ARISEN IN FAVOR OF OTHER PARTIES TO THE AGREEMENT ARISING OUT OF THEIR DEALINGS IN RESPECT TO THE SAME WHETHER SUCH ASSIGNEE HAD NOTICE OR NOT OF SUCH CHANGES, ADJUSTMENTS OR EQUITIES, AS IT IS HIS DUTY TO MAKE INQUIRY OF THE OTHER PARTIES TO SUCH CONTRACT. HE COMES IN MERELY AS A SUBSTITUTED PARTY BOUND TO MAKE INQUIRY AS TO THE EXISTING STATUS OF SUCH CONTRACT AND THE RIGHTS OF THE RESPECTIVE PARTIES ARISING OUT OF THEIR DEALINGS UNDER OR IN EXECUTION OF THE SAME.

Of the above proposition there can be no serious doubt. Parties to an agreement being the only ones directly interested therein have the lawful right to change or modify its terms, vary from the strict letter thereof in respect to performance, make such adjustments thereunder as they may deem advisable and may deal with each other on the strength of the existing obligations of the one towards the other thus creating equities in favor of one as against the other in respect to such contract and the future performance thereof.

A stranger seeking to obtain any interest of one of the parties in such contract should have no right to affect, set aside, or ignore the dealings had in good faith between the original parties to such agreement. If permitted to come in under the agreement by assignment from one of the parties he should come in merely as a substituted party, and if he assumes to take the benefits of the agreement he should stand in no better plight with reference to the same or with reference to demanding performance from the other parties thereto than his assignor would. To hold otherwise would be to destroy the liberty of parties to an executory contract to make such changes or variations in respect to their rights thereunder and to deal with each other in the execution of any such agreement as they may see fit.

It is known to even the neophyte in the law that according to the doctrine of the old common law choses in action or rights under contracts were not assignable. Courts of equity, however, at an early day began to recognize and enforce assignments of choses in action and beneficial interests arising under certain classes of executory contracts, but attached thereto the equitable provision that such assignment should be subject to all equities which arose between the original parties until notice of such assignment by any party thereto should be given to the other party or parties interested, so as to advise such other party or parties not to deal further with the assignor in respect to either the chose in action or the contract.

Courts of law subsequently gave effect to such assignments, attaching thereto the equitable rule affect-

ing the same, but only permitted the assignee to sue in the name of the assignor, thus giving full play to such equitable rule. The only exception to the above rule is that relating to negotiable instruments, which, by the law merchant or by statute, may pass from hand to hand before due, freed, when in the hands of a *bona fide* purchaser for value without notice and before maturity, from equities and many defenses which might have been set up against the original assignor.

See 2 Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 704, and note (k) to this section on page 1230, where it is said that the debtor can set up that his contract with the assignor has not been performed, and that the assignee takes subject to all the terms of the contract; also citing *Tyler Car & Lumber Co.* v. *Wettermark et al.*, 34 S. W., 807, where it was held that the debtor might set up advances against a certain portion of lumber delivered by the assignee under the contract which had been paid for by such prior advances from the debtor to the assignor.

In *Cowdrey* v. *Vandenbrugh*, 101 U. S., 572 and 575, a latent equity was imposed in favor of the original owner of a certificate which had been transferred.

Reeves v. *Kimball*, 40 N. Y., 299, is directly in point. There K. contracted to sell F. certain real estate, and F. went into possession. Soon afterwards, by a second written agreement between them, it was stipulated that K. should hold the title to the premises for the security of the amount payable under the contract "and such other sums as K. should let F. have for his note, or become holden for by endorsements or otherwise

for him." Subsequently K. did make further advances to F. on his note. Afterwards F. assigned the contract and transferred the possession of the lot to R., *a purchaser without notice of K's additional lien for advances.* In an action by R., to compel K. to convey, it was held that the latter was entitled to insist upon payment of the advances under the second agreement, as well as the amount due by the terms of the contract itself, as a condition of his conveyance; that in such case the receipt by the vendor from the assignee, subsequent to the assignment, of interest upon the amount due upon the original contract, without disclosing his additional lien, created no estoppel as to that against him.

In *Creighton and Wife* v. *Ingersoll*, 20 Barbour, 541, it was held that the assignee of a contract took it subject to adjustments made thereunder or in respect thereto previous to his substitution as a party thereunder.

In *Wood* v. *Donovan*, 132 Mass., 84, it appeared that A. made an oral contract with B. for the erection of a house by B. for him. B. partially performed this contract and after sundry modifications of the contract had been made, B., with the assent of A., made a written assignment to C. of all of his right, title and interest therein. It was held that the assignment was of the contract as it subsisted after the modifications thereof, and not of the contract as originally made. It is obvious that some of the terms of the original contract having been modified they were superseded in that respect by the modifications. The court said:

"We can have no doubt that the assignment was

of the contract as it then subsisted between them, and not the contract as it subsisted between them before any modification of it. The contract had been partially executed, and it was a partially executed contract which the parties had in their minds, and according to which the plaintiff agreed to complete the house.

In this condition of things, the natural and obvious purpose of an assignment would be to finish the contract which was then a subsisting contract. * * * The time and mode of payment, equally, with its amount, are essential parts of the contract. If the price to be paid by the original contract were increased or reduced before the assignment, the price then existing would remain the price to be paid. If by the original contract the payment was to be by a note on time, and the modification of the contract was that the payment should be in cash upon the completion of the work, the payment under the assignment must be according to the terms of the contract existing at that time."

In *Homer* v. *Shaw*, 177 Mass., 1 (58 N. E., 160), a contract to do certain work was subsequently modified and then assigned by one of the parties. It was held that the assignee was merely substituted in the place of his assignor and was bound by the terms of the modification, and could not recover where his assignor could not have recovered by reason of such modification.

In *Shuttleworth et al.* v. *Kentucky, etc., Co.*, 22 Ky. Rep., 1341 (60 S. W., 534), the assignee of one of the parties to an agreement was held bound by the provisions of a collateral contract made by his assignor in respect to the property involved.

In *Clay* v. *Woodrum*, 45 Kan., 116 (25 Pac., 619), the

Supreme Court of Kansas held that a third party who avails himself of a contract between others and claims under its provisions would be affected by the equities growing out of the contract between the parties thereto.

In *Kelly* v. *Schupp and others*, 60 Wis., 76 (18 N. W., 725), it was held that an assignee of a contract is bound by such admissions made by the assignor as would have bound the assignor himself.

Brown et al. v. *Divitt et al.*, 131 Pa. St., 455 (19 Atl., 80), is analogous in principle to the case at bar. There was a written agreement for the sale of an interest in land under an oil lease. The purchase money, $5,000.00, was payable in installments, for which judgment notes of the vendee were given. The agreement provided that the title to the property should not pass to the vendee until the full amount of the purchase money was paid. It also contained a provision that the oil produced from the well on the premises should be run in the pipe lines to the credit of the vendors and that the vendee should receive credit for it on the last installment. Subsequently it was ascertained by the parties that the vendee was entitled to a credit of $400.00 for the oil so run, and, applying this on the last installment, there was a balance of $1,600.00 of the purchase money unpaid. This balance, by the terms of the contract, was payable on the 28th day of April, 1888. The vendee requested the vendors to extend payment of this balance one year and it was finally agreed between them that one-half of it should be paid in six months and the remainder in eighteen months. The $2,000.00 note which had been given for the last

installment was then surrendered, and two notes of the vendee of $800.00 each, payable according to the agreement of extension were substituted for it. The vendors then gave to the vendee an order on the pipe line company to allow all the oil to be run in his name. By this arrangement the vendors relinquished their rights to have the oil run in the pipe lines to their credit, and extended the payment of $800.00 one year. In all other respects the agreement remained in force as written. It was not claimed by either party to this transaction that there was any agreement by the vendors to accept the new notes as payment or to release the leasehold from the lien for purchase money. It was held that a creditor who took an assignment of this executory contract took only the equitable estate of his assignor although at the time of the assignment he may have had reason to and did believe that the agreement was executed and that his assignor had the legal title. Ejectment against the assignee to enforce payment of the purchase money on this executory agreement was sustained.

In *Mangles* v. *Dixon*, 3 House of Lords Cases, 703, it was held that the assignee of a chose in action, or security of any kind, stands in exactly the same situation as the assignor as to the equities arising upon it. *He must be taken to be cognizant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information.* There A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, and was to have

half the profits. A charter party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16s a ton per month, to B., and bills were to be given, and payments from time to time made, by B., which, taken together, would cover one-half of the amount stipulated for the freight. On the arrival of the ship at home B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; but the first of which A's clerk was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses, the profits or loss" was to be borne by the parties in equal moieties; and by the other A. gave to B. a guarantee for the due performance by the clerk of the stipulations he had entered into. On the 1st day of December, 1845, while the ship was on the voyage, A. assigned to C., the charter party, and wrote on the margin thereof a note addressed to B. requesting him to pay "what was due." C. gave B. notice of this assignment and note. The notice was in the ordinary form, and C. made no inquiries of B. B. continued the payments which by the stipulations in the charter party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B. claimed as against C. to balance the account of profit and loss, as he would have been entitled to do with A. had the charter party not been assigned. Held, that in equity he was entitled to do so.

The Lord Chancellor, St. Leonards, said, on page 735:

> "The authorities upon this subject, as to liabilities, show that if a man does take an assignment

of a chose in action he must take his chance as to the exact position in which the party giving it stands."

Further, he said, on page 737:

"Where a man takes an assignment of a mortgage and gets the legal estate; even in that case he has not done sufficient for his perfect security to take it without having communication with, and obtaining the concurrence of, the mortgagor; for, whatever be the state of the account, although he gets a transfer of the legal estate, he is bound by the state of the account; and he cannot recover a shilling beyond what is actually due, although there is no endorsement of payments upon the mortgage deed, and although he has no notice of a single shilling of the money having been paid off. The rule, therefore, is perfectly clear."

In *Smith* v. *Orton*, 131 U. S. (appendix lxxv), it was held that the assignee of a bond took it subject to the equities of the original obligor or any defenses in respect thereto against the assignor, and *was bound to make inquiries of the obligor in respect to these matters.*

In *Wood* v. *Perry*, 1 Barb., 114, it was held that the assignee of a contract takes the same subject to all equities existing in favor of the other party against the assignor although such assignee may not have had notice of them at the time.

In *Townsend* v. *Corning*, 1 Barb., 627, a court of equity held the assignee of a contract for the purchase of land as taking the land subject to all the equities and liabilities resting upon the assignor at the time of the assignment, and that such assignee was therefore in equity bound to pay costs upon a note given for a

back installment due on the contract at the time of the assignment.

In *Lattomus* v. *Garman*, 3 Del. Ch., 232, it was held that a credit actually allowed by the assignor or *agreed to be allowed* before assignment will bind the assignee for value, whether with or without notice.

In Vol. 3, Current Law, page 335, it is said, referring to the assignment of contracts:

> "The assignee is not a *bona fide* holder, but he takes the property or right subject to all the equities existing between the parties; he is chargeable with any notice or knowledge the original creditor possessed of fraud on the part of the debtor affecting the collection of the debt, he takes the right subject to forfeiture for the acts of the assignor, and is bound by any settlement, or release, entered into by the assignor to the assignment."

See also, *Connor* v. *Parker*, 114 Mass., 331.

In *Murray* v. *Gouverneur, et al.*, 2 Johns. Cas., 438 (1 Am. Dec., 177), A. contracted to sell a house and lot to B. C. purchased of B. all his right thereunder, etc. It was held that C. though a *bona fide* purchaser *without notice*, must take the property subject to all the equities existing between the original parties, A. and B.

See also,

1 Parsons on Contracts, 9th Ed., star pages 227, 228 and 230.

Page on Contracts, Vol. 3, Sec. 1269.

V.

THE RECEIVERS AND TRUSTEES IN BANKRUPTCY, IN ASSUMING TO TAKE THE BENEFITS UNDER OR TO CARRY OUT THE LEASE AND AGREEMENT OF THE MOUNT CARMEL COAL COMPANY, STOOD IN THE SAME PLIGHT AS THAT COMPANY IN RESPECT TO SUCH CONTRACT, AND COULD ONLY ASSUME IT OR TAKE THE BENEFITS THEREUNDER SUBJECT TO ALL ADJUSTMENTS THERETOFORE MADE AND TO ALL EQUITIES IN FAVOR OF ALL THE OTHER PARTIES TO SUCH AGREEMENT AND IN THE EXACT CONDITION IS WHICH SUCH CONTRACT WAS AT THE DATE OF THE ADJUDICATION IN BANKRUPTCY.

The receivers and trustees in bankruptcy, representing as they did general creditors, came in as mere volunteers and not as purchasers in good faith. No doubt they might, under the authority of *Watson* v. *Merrill*, 136 Fed., 359, assume or reject the executory contracts of the bankrupt as might be deemed most beneficial or advantageous to the estate; and no doubt under clauses 3 and 5 of Section 2 of the Bankrupt Act, the bankruptcy court had the power to authorize the receivers and trustees to continue the business of the bankrupt, and to that end they might assume, therefore, the executory contracts of the bankrupt. It is obvious, however, that there existed no authority either in the bankruptcy court or in the receivers or trustees under the law to authorize or force upon the other parties to such a contract a different arrangement than that which at the time existed with the bankrupt. It is also obvious that general creditors, having no voice in the contracts made by their debtor, could not complain of any modifications made therein or

adjustments made thereunder by such debtor and other parties to the agreement.

The lease and agreement in question was not a matter of public record and indeed not being acknowledged could not have been recorded. It is not to be assumed, therefore, that general creditors gave credit to the Mount Carmel Coal Company upon the strength of this outstanding executory contract. As the verbal arrangement between the Mount Carmel Company and the Railway Company made with reference to this agreement was not required to be made a matter of record, creditors cannot complain that they were misled by the fact that the arrangement in question was merely verbal. If, therefore, for their benefit advantage is sought in having this executory contract of the bankrupt carried out, it is obvious that this should not be done to the prejudice of the other parties to the contract, who have acted within their lawful rights and in good faith in making any adjustments thereunder or modifications in respect to any performance thereof and who have dealt with the Mount Carmel Company upon the strength of its existing obligations thereunder.

From an early day equitable principles have been applied in respect to controversies which have arisen under bankrupt laws. In the early case of *Chapman* v. *Tanner*, I Vernon, 267, the equitable doctrine of a vendor's lien for unpaid purchase money was perhaps first announced in respect to the estate of a bankrupt. In that case it was held that if A. sells land to B., who afterwards becomes a bankrupt, and a part of the purchase money has not been paid, A. shall not be bound

to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though there was no agreement for that purpose. It was there stated:

> "Another point in this case was, that the bankrupt having bought land, and all the purchase money not being paid, the assignees would have had the vendor come in as a creditor under the statute for the remainder of his purchase money. *Per Cur.* In this case there is a natural equity, that the land should stand charged with so much of the purchase money as was not paid, and that, without any special agreement for that purpose."

Such equitable lien, as is well known, was cut off by a sale or mortgage to a *bona fide* alience without notice, but in the case of a bankrupt it was held that the creditors came in as mere volunteers and stood in no better position than the bankrupt.

See also II Story's Equity Jurisprudence, 12th Ed., Section 1038.

In Section 1228 of the latter work, it is said:

> "We have already had occasion to state, that the lien of the vendor exists against the vendee and against volunteers, and purchasers under him with notice, having an equitable title only. * * * The lien will also prevail against assignees claiming by a general assignment under the bankrupt and insolvent laws, and against assignees claiming under a general assignment, made by a failing debtor for the benefit of creditors; for in such cases assignees are deemed to possess the same equities only as the debtor himself would possess."

Under Section 70 of the Bankrupt Law the trustee is "vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt." There are but few exceptions in the bankruptcy

law to this, as in the case of a fraudulent conveyance by the bankrupt, or such liens upon property as the laws of the state in which it is located require to be recorded for the purpose of giving notice to general creditors.

As to the executory contracts of the bankrupt it would seem obvious that the receiver or trustee of the bankrupt cannot insist that he stands in a better position with reference to the other parties thereto than the bankrupt himself in respect to the right to have such agreement carried out.

In Sir William Anson's excellent work on Contracts (2nd Am. Edition of Knowlton) that eminent author says on star page 232:

> "Representation, whether in the case of death or bankruptcy, operates to confer in the one case upon the executors or administrators of the deceased, in the other upon the assignees of the bankrupt, his rights and liabilities; but the assignment is merely a mechanical contrivance for continuing, up to a certain point and for certain purposes the legal existence of the deceased or bankrupt. They to whom the contract is assigned take no benefit by it, nor are they personally losers by the enforcement of it against them. *They merely represent the original contracting party to the extent of his estate, and no more.*"

See also pages 223 and 224 of the same work.

It has, therefore, been consistently held by this court that under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, *in the same plight and condition that the bankrupt himself held it*, and subject to all the equities impressed upon it in the hands of the bankrupt.

See *York Mfg. Co.* v. *Cassell et al.*, 201 U. S., 344, and 352, in which it appeared that a conditional sale of property was made which was not filed as required by the Ohio statute and which would have been void as against subsequent attaching creditors or mortgagees, as it was nevertheless good between the parties it was held the title of the vendor would still be good against the trustees in bankruptcy.

To the same effect see:

Hewit v. *Berlin Machine Works*, 194 U. S., 296.

Stewart v. *Platt*, 101 U. S., 731.

Yeatman v. *Savings Institution*, 95 U. S., 764.

Thompson v. *Fairbanks*, 196 U. S., 526.

In *Hauselt* v. *Harrison*, 105 U. S., 401, A. entered into a written contract with B., whereby in consideration of moneys advanced by the latter for the purchase of skins he agreed that he would tan, finish and deliver them to B. B., in consideration of a commission on sales and a further percentage to cover insurance, storage and labor agreed to sell them, and put the proceeds less his commission and advances, at the disposal of A. It was further agreed that all the skins, whether green, in the process of tanning, tanned, or tanned and finished should be considered as security for refunding the moneys advanced. The business was, for about six months, carried on until A. became unable from sickness and financial embarassment, to proceed with it, and he was then indebted to B., who was aware of his condition. They, in order to carry out the first agreement, entered into another, whereby B. was to take possession of A's tannery and run and use it with

such materials there as would be necessary to finish and complete the skins and sell them, the net proceeds to be put to the credit of A. after deducting advances and expenses. A., four days thereafter, filed his petition in bankruptcy. B. took possession of the tannery, and A's assignee in bankruptcy brought replevin for the skins. It was held that A. had not an unqualified property in them, but that they were subject to a charge in the nature of a mortgage in favor of B. which was binding on the parties and A's assignee in bankruptcy. On page 406, it is said:

> "The assignee takes the title, subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. * * * He takes the property in the same plight and condition that the bankrupt held it."

In *Scott* v. *Armstrong*, 146 U. S., 499, it was held that the receiver of an insolvent bank took no greater rights in the property of the bank which came into his possession than that which the insolvent bank possessed. The assignee in bankruptcy, except in cases of fraud, stood in no better situation than the bankrupt.

See:

Winsor v. *McLellan*, 2 Story, 492 (Fed. Case No. 17,887).

Winsor v. *Kendall*, 3 Story, 507 (Fed. Case, No. 17,886).

Ex parte Newhall, 2 Story, 360 (Fed. Case, No. 10,159).

In *Mitchell* v. *Winslow et al.*, 2 Story, 630 (Fed. Case, No. 9,673), Mr. Justice Story said:

> "Now, it is most material to bear in mind, under this aspect of the case, that it is a well established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and, consequently, they are affected with all the equities, which would affect the bankrupt himself if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in *Brown* v. *Heathcote*, 1 Atk., 160, 162, where he said: 'The ground that the courts go upon, is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees.' The same doctrine was recognized by his lordship in *Jewson* v. *Moulson*, 2 Atk., 417, 420. Sir William Grant (M. R.), in *Mitford* v. *Mitford*, 9 Ves., 87, 100, said: 'I have always understood the assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights, precisely in the same plight and condition as he possessed them. Even where a complete title vests in them and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. *This shows that they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class as voluntary assignees and personal representatives.*'"

See also the opinion of Sir William Grant, Master of Rolls in *Mitford* v. *Mitford*, 9 Ves. Jr., page 100.

See also:

Brown v. *Heathcote*, 1 Atk., 160, 162.
Collier on Bankruptcy, 5th Ed., 554.
Chattanooga Natl. Bank v. *Rome Iron Co.*, 102 Fed., 760.

In *Lindeke* v. *Associates Realty Co.*, 146 Fed., 631, it was held that a notice of forfeiture of a lease given to the lessee was binding on the trustees in bankruptcy of such lessee.

In *Whitney* v. *Eaton et al.*, 15 Gray, 225, there was a sale of goods conditioned on the payment of a six months' note. A few days after the purchase and delivery of the goods and a long time before the note would have become due if given, the buyer assigned for the benefit of creditors. It was held that the vendor was not concluded by the entry in the broker's books, but might prove by any competent evidence, oral or in writing, that payment by note was part of the contract. It was also held that the sale was conditional on such payment, that the vendor had not waived the performance of the condition although he had delivered the goods without demanding the note, and that the title to the goods had not vested in the purchaser or his assignee in insolvency.

In *Lamb* v. *Hall et al.*, 147 Calif., 44 (81 Pac., 288), it was held that a trustee in bankruptcy claiming under a lease to the bankrupt was bound by an assignment of a half interest of a portion of the leased premises made by the bankrupt prior to the bankruptcy.

See *Foster* v. *Hackley & Sons*, 2 N. B. R., 416, 417, where among other things, it was said that it was not

the purpose of the bankrupt law to interfere with and avoid contracts made by the bankrupt with other parties, or to prevent their execution.

See also:

Chace v. *Chapin*, 130 Mass., 129.

In *Van Waggoner* v. *Moses*, 26 N. J. Law, 570, it was held that property assigned by an insolvent was bound by an execution, though not levied before the assignment, and also that the judgment creditor did not waive his rights under his execution by claiming as a general creditor under such assignment.

In *Sayre* v. *Weil*, 94 Ala., 466 (10 Southern, 546), defendant deposited money in a bank to the credit of himself as "trustee for G. children." He also owed the bankers on his note, and directed them to apply such trust fund toward the payment of the note. They agreed to do that, and to deliver the note as soon as their cashier could make proper entries. Before the note was delivered they assigned for the benefit of their creditors. In an action on such note by the assignees it was held that the agreement to apply such trust fund bound the bankrupt and that the assignees were invested with no higher or more extensive authority than the bankrupt. The same defendant had made another deposit in the name of his wife and it was understood by the bank that he could check against this deposit. He subsequently checked against the deposit but his wife had not drawn upon it. At the time defendant directed the application of the trust fund toward the payment of his note, he directed, also, that enough be taken from the deposit in the name of the wife to pay the balance due on the note. The bankers

agreed to this and the wife ratified the act of the defendant. Held, that this agreement bound the bankers.

In *Hasbrouck* v. *Stokes et al.*, 13 N. Y. Suppl., 333, it was held that a general assignee for the benefit of creditors of a lessee took a lease subject to the right of the lessor to forfeit the same for a default of the assignor prior to the assignment. In other words, that such assignee could not take the benefits under the lease without discharging the burden which had attached thereto among other things, without removing the default of his lessor which had subjected such lease to a forfeiture.

In *Spencer* v. *World's Columbian Exposition*, 58 Ill. App., 637, a receiver was appointed to carry on the business of an insolvent company upon the Exposition grounds, and it was held that the rent or percentage of profits due from the insolvent to the Exposition for the concession, was a part of the expenses which had necessarily to be paid by the receiver in order to be permitted to carry on the business and should be paid by the receiver out of funds in his hands in preference to creditors.

In *Longstreth* v. *Penock et al.*, 15 Fed. Cas., No. 8,488, it was held that rent for a store occupied by a bankrupt, and subsequently by his assignee, where there was sufficient goods to satisfy rent on distress, should be paid in full by assignee up to the time of the surrender of the property. There was rent in arrear at the time of the bankruptcy.

See also:

O'Hara v. *Jones*, 46 Ill., 289.

In the case of *Fourth Street Bank* v. *Yardley*, 165 U. S., 635, an equitable lien upon certain funds of a debtor in the hands of a third party was created in favor of a bank upon the insolvency of such debtor, such lien being implied from the nature of the dealings of the parties.

On page 644 it is said:

> "A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him and volunteers, or claimants under him with notice of the agreement."

In *Howe* v. *Harding*, 76 Tex., 17 (13 S. W., 41), it was held that where a railroad company, in consideration of a right of way, had contracted with the grantor for the erection of a tank on his land for its use to be supplied with water from his spring, and agreed to pay him therefor, a lien to secure such payment existed on the earnings of the road in the hands of a receiver subsequently appointed, and who continued to use such right of way.

Referring to this case, it is said in Beach on Receivers, Alderson's Edition, Sec. 328:

> "It was correctly asserted that where the receiver enjoys the benefit of a contract he must assume its burdens."

In *Knowles* v. *Lord*, 4 Wharton, 500 (34 Am. Dec., 525), it is said on page 529:

> "But a voluntary assignment by a debtor has never been considered as placing the assignee in any other situation in point of equity than the assignor himself was; he takes the estate subject to all outstanding equities, liens, incumbrances, and

> *dealings* between the assignor and others; and such has been the uniform construction put on assignments of this description."

In *In re MacDonald*, 138 Fed., 463, it was held that the trustees in bankruptcy were not entitled to hold unfinished ships as against the party for whom the bankrupt had been building them and who had made payments on the same.

To the same effect see *In re Rockford, R. I. & St. L. Rld. Co.*, 1 Lowell, 345 (20 Fed. Cas., 11, 978).

Of course, the trustees in bankruptcy cannot apply that part of a transaction or agreement which is beneficial and repudiate or reject that which is burdensome.

Thus *In re Standard Laundry Co.*, 112 Fed., 126, it is said:

> "A party cannot apply to his own use that part of the transaction which may bring to him a benefit and repudiate the other, which may not be to his interest to fulfill."

See, also:

In re Kellogg, 112 Fed., 52.

Goddard v. *Weaver*, 1 Woods, 257 (Fed. Cas., 5, 495).

It would be an unwarranted exercise of power on the part of the court to permit its trustees and receivers to continue in possession and to continue in effect the executory contract of the bankrupt, and at the same time exclude the other parties thereto from rights which had arisen thereunder, when they would have had the right to repudiate on account of the defaults of the bankrupt and of the receivers.

Now, at the time of the bankruptcy there was in

force and effect between the parties a written lease and agreement in respect to which the Railway Company had by its advancements acquired the right to performance of the obligations of the bankrupt in the way of delivering coal thereunder the equivalent of such advancements without paying again for the same. This was the plight and condition under the lease and agreement when the receivers in bankruptcy undertook through the instrumentality of the court to secure for the benefit of general creditors the benefits thereof. Such general creditors, of course, were not entitled to any of the earnings or profits derived from the lease and contract in question or such as might be derived from the further carrying out of the same until all obligations of the bankrupt and receivers in bankruptcy in respect to the same had been fully discharged. It would be indeed inequitable for the court to permit its receivers to retain possession of the leased premises and continue the contract in operation for the benefit of strangers, taking the profits to be derived therefrom, and at the same time to repudiate the obligations and burdens in respect to the same which had been imposed in good faith upon the bankrupt prior to his bankruptcy and by legitimate dealings of other parties thereto upon the strength thereof.

If a contractor had undertaken to construct a building or other structure for another party and in the agreement such other party had agreed to pay in installments as the building progressed, but, to accommodate such contractor he had in fact afterwards paid an installment prior to the date the same would become strictly payable by making advancements to the

contractor on the strength of the latter's obligations, would it be pretended that an assignee of the contractor, had the latter become bankrupt, could claim the right to finish the building and ignore the advancements theretofore made, and insist that all such payments, as by the strict letter of the original agreement would become payable thereafter, should still be made. Could such an assignee take the benefit of such contract, complete such structure, and recover all installments without crediting the advancements or prepayments made? If so, then the assignee or the bankrupt estate would take such contract as property of the bankrupt and stand in much better plight in respect thereto than the bankrupt himself would and the other party who was not at fault would be remediless. Thus parties to an agreement, who had a lawful right to modify or adjust their arrangements under the same, would then discover that, without any fault of their own but on account of the fault of some other party to such agreement, their rights thereunder would be materially altered and their standing in respect to the same materially prejudiced.

VI.

THE RECEIVERS AND TRUSTEES BEING IN POSSESSION UNDER THE PROTECTION OF THE BANKRUPTCY COURT, THAT COURT WAS BOUND TO SEE THAT ITS OFFICERS DEALT FAIRLY AND HONESTLY WITH THE RAILWAY COMPANY AND THAT IF THEY CONTINUED TO ASSUME FOR THE BENEFIT OF THE BANKRUPT ESTATE OR GENERAL CREDITORS AN EXISTING AGREEMENT AND HOLD PROPERTY COVERED THEREBY UNDER THE POWER OF THE COURT, THEY WERE BOUND IN EQUITY AND GOOD CONSCIENCE TO DISCHARGE THE OBLIGATIONS AND BURDENS WHICH HAD ATTACHED THERETO BY REASON OF PRIOR DEALINGS OF THE OTHER PARTIES AND THE BANKRUPT IN REFERENCE THERETO.

The position and contention of the receivers and trustees has at all times been wholly inequitable and unjust to say the least. By virtue of their possession which was being protected by the court they arbitrarily proceeded to deal with the agreement and the rights of the bankrupt thereunder as they saw fit, repudiating a just claim of the Railway Company that it was entitled to performance from the bankrupt to the extent the same had been paid for by the advances, and that such obligation had attached to and become a part of the existing arrangement. The conduct of the Railway Company was entirely equitable and just. It did not seek to obtain any advantage over the receivers or trustees by demanding an absolute cancellation of the agreement, but gave them due notice of its claim and demanded as a matter of justice that the court should direct the receivers or trustees to at once make their election so that the Railway Company

should not be further prejudiced by reason of the fact that the property covered by the lease and agreement had been seized by and was in the custody and under the power of the court. A refusal to make the election under the circumstances was not only unjust but arbitrary and the continued possession by the trustees was wrongful to say the least.

Under the bankruptcy law the bankruptcy court is regarded as a court of equity and is invested with equity jurisdiction.

In re Kane, 127 Fed., 553.
Section 2, Bankruptcy Act.
Bardes v. *Hawarden Bank*, 178 U. S., 535.

It is bound not only to deal equitably, but to see that its officers set an example of honesty and fairness.

Thus *In re Tyler, Official Receiver, Ex parte*, King's Bench Division (1907), Volume 1, page 865, it was held by the Court of Appeals that where a wife had paid the premiums and interest on a policy held by her husband before and after the bankruptcy of the latter and where insurance was collected by the official receiver he would be required to reimburse the wife for the amount so expended.

Mr. Vaughn Williams, L. J., said on page 869:

> " 'I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to some one else ought to set an example to the world by paying it to the person really entitled to it. *In my opinion the court of bankruptcy ought to be as honest as other people.*' "

Referring then to cases of money paid under mistake of law in which a court of law would not allow a recovery in an action between private parties to avoid a greater evil in order to put an end to litigation, he continues:

> "Although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. *It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law.*"

On page 870, he continues:

> "In this particular case, having regard to the fact that these policies were entered into by the bankrupt before the commencement of his bankruptcy, and then the wife at his request advanced the money to pay the premiums, it seems tolerably plain, quite irrespective of the rule in *Ex parte* James and *Ex parte* Simmonds, that she had such an interest in the policies as entitled her to prevent the trustees or other representative getting the benefit of those policies without recouping the premiums which she had paid."

That principle is recognized *In re Chase*, 124 Fed., 753, (Circuit Court of Appeals, First Circuit), in the language quoted therefrom by the Circuit Court of Appeals in the case at bar, as follows:

> "It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt and that *he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant.* Williams' Law of Bankruptcy, Seventh Edition, 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the

trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts of common law or chancery."

To the same effect, see:

Hutchinson v. *Le Roy*, 113 Fed., 202, (51 C. C. A., 159).

Hutchinson v. *Otis*, 115 Fed., 937 (53 C. C. A., 419).

Batchelder & Lincoln Co. v. *Whitmore*, 122 Fed., 355.

In re Rochford, 124 Fed., 182 (C. C. A., 388).

Authorities illustrating this principle are numerous and preferential claims have been established against the bankrupt estate by reason of the dealings and acts of the trustee.

In *William Openhym & Sons* v. *Blake*, 157 Fed., 536 (C. C. A., 8th Circuit), a seller of goods to a bankrupt rescinded for fraud and notified the trustee, but was prevented by the court from replevying the goods. It was held that he might intervene if the goods were sold by the trustee and have his claim established as preferential.

In *Erie R. R. Co.* v. *Dial*, 140 Fed., 689 (C. C. A. 6th Circuit), a manufacturing corporation a short time before its bankruptcy, purchased rubber to manufacture into tires, which were to be paid for on delivery. The rubber was shipped with drafts attached to the bill of lading. The railroad company unloaded the rubber upon a platform near the bankrupt's factory, on which freight destined to the bankrupt and other parties in that locality was customarily unloaded, and to

which there was a switch track, and it was forthwith taken and used by the bankrupt with other rubber, in the making of tires before the drafts by the vendor were presented. The drafts were not paid. Claims being made on the railroad company by the shippers for wrongful delivery, the railroad company purchased and took assignments of the claims of the shippers against the bankrupt. Held, that the action of the bankrupt in taking possession of the rubber and mingling it with its own property without making payment therefor was wrongful, and gave it no title as against the shippers or their assignee (the Railway Company), who succeeded to their rights, and that such assignee was entitled to recover from the bankrupt's trustee, in preference to general creditors, the value of such portion of the rubber or its proceeds as came into his hands.

On page 691 the court held that a court of equity will accord a lien in favor of the owner upon the mass of property for the value of the things intermingled and that the interest of the trustee in bankruptcy was no other or greater than that of the bankrupt. The order of the District Court refusing to allow the claim as preferential was, therefore, reversed and the cause remanded with instructions to ascertain what part of the assets of the bankrupt were chargeable with a lien in favor of the petitioner upon the principles affirmed by this opinion, and to take proofs if necessary, for that purpose, and thereupon order that the trustee pay those claims of the petitioner which were acquired from the shippers with interest from the time they accrued to the extent of the sum of such assets. That was done because the proceedings in the court below

did not go far enough to fix data necessary for the Appellate Court to make a decree. See, also, pages 691 and 692.

In re J. F. Grandy & Son, 146 Fed., 318, 319, an equitable lien in favor of a wife was established by the court on policies held by her husband who became a bankrupt though he did not assign the same until he became insolvent. There was a parol agreement to assign in consideration of her release of dower in property which he wished to transfer.

In *Baer Sons Grocer Company* v. *Williams*, 43 W. Va., 323 (27 S. E., 345), goods were ordered before but delivered after a trust deed for the benefit of creditors was executed. The trustee took them into stock and sold them along with other goods. The court held that this charged the value of such goods as a prior lien on the trust funds in the hands of such trustee. On page 348 it is said:

> "The trustee, instead of returning them, as he should have done, took possession of them and put them in the stock. They were sold at retail along with the other goods, and the proceeds thereof went to swell the funds of the trust. To allow their retention, unpaid for, would be to perpetrate a fraud upon the appellants."

In re Cramond, 145 Fed., 976, an equitable lien, good under the bankruptcy law, was established, on moneys thereafter earned, in favor of a bank making advancements to a contractor to enable him to perform his contract with a city.

In re Royea's Estate, 143 Fed., 182, an equitable lien was imposed upon the bankrupt estate on account of a general deposit made by the bankrupt of trust funds.

In re Loveland, 155 Fed., 838, a mortgagor after having paid part of the mortgage debt borrowed further sums from the mortgagee and endorsements were made upon the mortgage note to the effect that such sums should be added to the amount previously remaining due thereon. It was held that the mortgage was a lien in equity for the full amount of the debt as so increased as against the mortgagor's trustees in bankruptcy.

In *Hanson* v. *Blake & Co.*, 155 Fed., 342, an equitable lien was impressed upon insurance policies in the hands of a trustee in bankruptcy on account of an oral agreement between the bankrupt and parties advancing funds towards the construction of the building insured under the understanding that the same should be insured for their benefit.

In *Frazer* v. *Hallowell*, 1 Binney, 126 (Pa.), A., as an agent for B., and to secure a debt due him, took a mortgage of real estate in his own name from the debtor and then obtained a release of the equity of redemption. A. retained the title deeds and B. received the rents and profits. Afterwards A. lent his notes to B. and finally took them up, shortly after which B. was declared a bankrupt. It was held that B.'s assignee could not recover the premises from A. until they reimbursed him the amount so paid for B.

As stated heretofore in *Howe* v. *Harding*, 76 Texas, 17, a lien was impressed upon the earnings of a railroad in the hands of a receiver because the receiver had taken and enjoyed the benefit of a contract made in consideration of the granting of a part of the right of way.

In *Clyde* v. *Richmond & D. R. Co.*, 63 Fed., 21, it was held that receivers who took possession of and operated leased lines of railroad for more than a year, and received the earnings thereof, were bound to disburse the same in accordance with the terms of the lease; and where they applied such earnings to the payment of interest on the bonds, when the lease required that the taxes should be first paid, the court would require them, even after the leased roads had been surrendered, to restore the diverted money by paying the taxes in question. Part of the taxes in question had accrued a couple of years prior to the receivership.

On page 24, Judge Simonton said:

> "When receivers are appointed for a line of railroad embracing leased lines, they do not necessarily assume the responsibility for the covenants of any of the leases, nor take the place of the lessees. They must have reasonable time within which to determine what they will do, and whether it is for the interest of the trusts committed to them to undertake the leases. * * * But if the receiver after a reasonable time continues to use and operate the leased lines, he is bound by the terms of the lease (*Woodruff* v. *Railway Co.*, 93 N. Y., 609; *Brown* v. *Railroad Co.*, 35 Fed., 444); certainly to the extent of the earnings of the lines. (*Central Trust Co.* v. *Wabash, St. L. & P. Ry Co.*, 34 Fed., 259.) In the present case the receivers took possession of all these leased lines, operated them, received and disbursed the earnings, from June, 1892, to August, 1893. They practically, by payments, recognized the terms of the lease, and acted under them. They paid operating expenses, a large part of the taxes, and the interest on the mortgages. By their report in evidence, they were in receipt of earnings from the system large enough to pay all operating expenses, insurance and taxes, and a large part of the interest.

> These earnings went into their hands because of this lease. Whether they received them as lessees, or in any other capacity, they were bound to disburse these earnings in accordance with the terms of the instrument under which the earnings were received. Under the lease, these earnings were to be applied first to the operating expenses, insurance and taxes, before they were applied to the coupons on the mortgage bonds. The payment of the latter was a diversion of moneys appropriated to the taxes, and this diversion must be restored. These receivers must pay all balances of taxes for the periods stated which are lawfully due, and it is so ordered."

As stated heretofore, in *Spencer* v. *World's Columbian Exposition*, 58 Ill. App., 637, a receiver of an insolvent company, carrying on its business on the exposition grounds, was directed to pay a percentage of profits due from the insolvent to the Exposition for the concession, as a part of the expenses of administering the estate.

The referee in bankruptcy, however, stated in his opinion (Rec., 31 and 32):

> "Although there are equities in favor of petitioner's claim, by reason of having advanced money to meet pay rolls and keep the Mount Carmel Coal Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors."

He at the same time held that intervenors were not entitled to a cancellation or termination of the agreement as to the trustees. It is obvious that by taking a narrow view of the law, he just missed making a correct decision.

It would seem they had a better notion of equitable

remedies more than a hundred years ago. Thus in *Legard* v. *Hodges*, 1 Ves. Jun. 477, 478 (30 Eng. Rep. Full Reprint, 447), before Lord Thurlow in 1792, it was held that a covenant to set apart and pay annual profits of land was in equity a lien or charge on the land against the covenantor and claimants under him with notice. To the contention that it was but a mere personal covenant and referring to a former case, he said:

> "Excluding that case, none of the rest go to establish a proposition in contradiction to this maxim, which I take to be universal, that wherever persons agree concerning any particular subject, that in a court of equity as against the party himself, and any *claiming under him voluntarily* or with notice, raises a trust. These persons have so claimed; and, therefore, this is a pure trust estate, and they must be declared trustees for one-third of the annual profits, and must account from the time of taking possession, having all just allowances."

This decree was affirmed as to the principle point on a rehearing before Lord Loughborough, C., in 1793, 4 Bro. Ch. Ca., 421, (29 Eng. Rep. Full Reprint, 969).

The Railway Company was wholly at the mercy and within the power of the court. It needed coal daily for the operation of its lines. It was justly entitled to be supplied from the mines which had been seized by the court. It was entitled to have its coal supplied in accordance with the arrangements existing at the date of the bankruptcy. The possession and operation of the receivers could only be lawfully maintained by accepting and complying with the existing agreement. A retention of possession in repudiation of any part of that agreement would necessarily be unauthor-

ized and wrongful. If the existing arrangement was not to be carried out by the receivers the Railway Company was entitled to have the mines surrendered at once to its affiliated companies, the lessors, or to the Mount Carmel Coal Company so that it could be supplied according to the existing arrangement. But the court and its officers have arbitrarily and unjustly withheld possession unless it be held that the agreement with the existing burdens has been assumed by the acts of the receivers and trustees for the benefit of the bankrupt estate. As it cannot be assumed that the court intended to act wrongfully and arbitrarily it follows as a result that it must be held that the contract with the existing burdens and equities in favor of the Railway Company has been assumed and its claim must be paid as an expense of administration and is, therefore, preferential.

VII.

THE RELIEF ASKED FOR WAS ENTIRELY EQUITABLE BUT WAS MISCONCEIVED BY THE DISTRICT JUDGE AS MERELY ASKING FOR A STRICT FORFEITURE.

It was said in the opinion of the lower court and is reiterated in the argument, that a breach of the verbal arrangement, though engrafted on the lease, would not justify a forfeiture as no forfeiture was provided for in the verbal arrangement; that forfeitures are not favored in the law, and authorities are cited to support the last contention. The intervening petition did not ask for an absolute forfeiture or, indeed, an absolute termination of the written lease

and agreement because of any default of the receivers, but it specified the nature of the default and asked the court to either have the default satisfied or the contract terminated in accordance with its terms, and in the latter event for possession of the property covered thereby. A refusal of such relief whereby the trustees were permitted under the power and protection of the court to continue to take the benefits of the lease and agreement and repudiate a burden which had attached thereto, was altogether inequitable and prejudicial to the rights of the Railway Company.

The court evidently did not comprehend the alternative nature of the relief asked, but attempted to dispose of each phase thereof separately and independently—thus failing to grasp the equity of the case as really presented.

However, it has been well said even in respect to conditions for forfeitures, in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed., 803 and 819:

> "There is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice and morality than to withhold equitable relief."

That was approved in *Lindeke* v. *Associates Realty Co.*, 146 Fed., 631, 639 and 640.

In the 17th article of the written lease and agreement (Rec., 49) it was provided that the Railway Company might itself terminate the entire agreement for failure of Devlin, or his assignee (the Mount Carmel Coal Company) to perform any of his obligations, if within thirty days after written notice of such failure and the nature thereof, he did not cure such fail-

ure by performance satisfactory to the Railway Company. Now, if the bankrupt, after the advancements had been made, had declined to furnish more coal under the agreement unless it was paid again therefor by the Railway Company to the equivalent of such advances, it would seem clear that such refusal would be a refusal to comply with an obligation under the written contract, and that the Railway Company might give the thirty days' notice and terminate the same as therein provided. An assignee of the Mount Carmel Coal Company would be under the same obligations and subject to the same conditions if he undertook to assume the contract. He would have no greater rights. In view of the substitution of the receivers in bankruptcy in the place and stead of the bankrupt and of the possession of the bankruptcy court, the intervening petition which was filed sufficiently performed the office and function of any such notice required by the contract, and was, indeed, the only appropriate method which could have been adopted by the Railway Company under the circumstances to have the default cured or the agreement terminated. The intervening petition was on file a sufficient length of time to enable the receivers in bankruptcy to comply and thus obviate any ground for termination. To say that they did not have sufficient formal notice under the intervening petition so as to be afforded every opportunity which was intended in the written contract to enable them to comply with the obligation of the bankrupt and restrain the default, would be an attempt to so technically construe the provisions of the written agreement as to be entirely inequitable and unjust under the existing circumstances. It was not necessary, of course, in the

verbal arrangements covering advances to make specific provision for termination of the written lease and agreement in case the Mount Carmel Coal Company should refuse to deliver coal as required by the agreement unless the same was paid for again because, as stated, such refusal to deliver without just cause and except for some default of the Railway Company would be a breach of its obligations as stated in the written contract.

Again, it may be said that at the date of bankruptcy the contract and arrangement with the bankrupt might be shown by the writing and the verbal agreements covering advances, which verbal agreements varied, to the extent acted upon, the mode of performance of the Railway Company, but did not change the obligations of the Mount Carmel Coal Company. It is evident that if the latter company had repudiated the verbal arrangements which had become engrafted upon the written contract and had refused to deliver more coal to the Railway Company unless it should be paid again for the same after delivery, the Mount Carmel Coal Company would be held as repudiating a substantial part of the existing contract which repudiation would have justified the other parties, upon general principles of law, in terminating such contract and in claiming that they were no longer bound thereby because of such repudiation.

A refusal to make a single delivery under a contract requiring continued deliveries of articles specified as required by the provisions of an existing agreement unless the other partes should forego some provision therein to which they may be entitled may be treated

by such other parties not in default as a rescission or abandonment of the entire contract. When one attempts arbitrarily to thrust upon another a different arrangement than that agreed upon, the other party is at liberty to treat the actual agreement as abandoned and sue the first party for damages resulting from a breach of the entire contract, because the real contract was repudiated by the first party. This is especially true if the refusal be to comply with a substantial provision or term of an existing agreement.

Johnson Forge Co. v. *Leonard,* 3 Pen. (Del.), 342 (51 Atl., 305).

Michigan Yacht & Power Co. v. *Busch,* 143 Fed., 929.

National Machine & Tool Co. v. *Standard Shoe Machine Co.,* 181 Mass., 275 (63 N. E., 900).

Cresswell R. & G. Co. v. *Martindale,* 63 Fed., 84 (C. C. A., 8th Cir.).

L. Bucki & Son Lbr. Co. v. *Atlantic Lumber Co,* 109 Fed., 411.

Norrington v. *Wright,* 115 U. S., 188.

Filley v. *Pope,* 115 U. S., 213.

Providence Coal Co. v. *Coxe et al.,* 19 R. I., 380 and 582 (35 Atl., 210).

Pope et al. v. *Porter et al,* 102 N. Y., 366.

Mayor of Baltimore v. *Schaub Bros.,* 96 Md., 534 (54 Atl., 106).

Withers v. *Reynolds,* 2 Barn. & Adol., 882.

Refusal on the part of the receivers and trustees to carry out the obligations of the Mount Carmel Coal Company under the existing arrangement would, in like manner, justify a rescission or termination of such

agreement by the other party upon general principles. As a matter of strict right the Railway Company was entitled to a termination of the entire agreement and certainly when the evidence was taken it was at least entitled to the alternative relief prayed for. A denial of all equitable relief by the bankruptcy court which was still withholding possession of the property covered by the contract could not be considered as consonant with principles of right or justice. The action of the bankruptcy court and its officers, the trustees, would leave the Railway Company entirely remediless and would give to general creditors of a bankrupt an advantage in respect to the execution of an executory contract and receiving the fruits thereunder greater than the bankrupt could have claimed.

To obviate any possible prejudice we may be pardoned in commenting upon a statement found in the opinion of the District Judge, which, though not a part of the record, might be read with some resulting misconception.

In the opinion of the District Judge it was suggested that receiver's notes or certificates had been issued creating a paramount lien on all the estate of the bankrupt, and that for such reason a superior equity would arise in favor of such parties holding the same as against the Railway Company. In the first place, it may be stated that the record did not show that any such certificates had been issued, or, if issued, the facts or circumstances under which they were issued. In the next place, if issued, they were not issued at the solicitation or with the connivance of the Railway Company, and it is difficult to understand upon

what principle its rights or equities could thereby be prejudiced. Again, it did not appear that the holders of such certificates were asserting any claims or rights in respect to this particular agreement or that the certificates were even issued upon the faith of the same. Certainly there was no defense interposed by the trustees upon any such ground. Further, it might be said, that as the District Judge found it necessary to go outside of the record to find a reason for his conclusion, that the receiver's notes or certificates have all since been satisfied and taken up by the trustees out of the profits realized from this agreement. Any such matter must, therefore, be eliminated from the consideration of this case. No point is made in appellant's brief based upon such statement in the District Judge's opinion. It is merely referred to here to obviate any prejudice.

VIII.

THE RECEIVERS AND TRUSTEES AFTER BEING NOTIFIED BY THE INTERVENING PETITION OF THE VERBAL ARRANGEMENT AND VARIATION, BY CONTINUING TO ACCEPT THE BENEFITS OF THE WRITTEN AGREEMENT AND BY CONTINUING TO PERFORM THE SAME, MUST BE DEEMED TO HAVE ASSUMED THE ENTIRE ARRANGEMENT AS VARIED OR MODIFIED WITH ITS EXISTING BURDENS AND OBLIGATIONS, PARTICULARLY AFTER THE ARRANGEMENTS HAD BEEN SHOWN ON THE HEARING. IN ANY EVENT IT WAS INEQUITABLE IN THE COURT, AFTER ASCERTAINING THAT THE VERBAL ARRANGEMENTS IN FACT EXISTED, TO PERMIT ITS RECEIVERS OR TRUSTEES TO CONTINUE TO ENJOY THE BENEFITS OF THE AGREEMENT WITHOUT DISCHARGING THE BURDENS INCIDENT THERETO WHICH EXISTED AT THE DATE OF THE BANKRUPTCY. THE BANKRUPTCY COURT COULD NOT JUSTLY SEIZE OR HOLD THE CONTRACT AS PROPERTY OF THE BANKRUPT FOR THE BENEFIT OF ITS ESTATE WITHOUT DISCHARGING THE EQUITABLE CLAIMS IN FAVOR OF OTHER PARTIES THERETO UPON THE SAME.

It is stated in argument that the receivers of a court have a reasonable time in which to elect whether to assume or reject executory contracts of the insolvent and to make such election have a reasonable time to ascertain the burdens and benefits thereof, and cases of railroad receiverships are particularly referred to.

Such receiverships, we respectfully suggest, are to be differentiated from the case of receiverships of private individuals or purely private corporations. In the case of a railroad receivership where a line of railroad has

been operated as part of a system under a lease, public necessity requires the continued operation of such line and the court and its receivers in foreclosure proceedings are therefore allowed some latitude and time to ascertain whether the lease should be adopted or the premises covered thereby surrendered up. Duty to the public requires a continued operation of the railroad. Such public exigency applicable to the operation of *quasi public* highways can have no application in a case of the bankruptcy of private individuals or corporations and in respect to the assumption of the private agreements of the bankrupt. Other parties to such contracts have rights which should not be prejudiced. It is, however, quite plain that after a hearing was had before the referee, the receivers, and afterwards the trustees in bankruptcy, as well as the bankruptcy court itself, were fully advised of the existence and nature of the verbal arrangements in question; that the advancements had been made by the Railway Company and what was the understanding in respect to the same. They were fully advised of all the *facts*. It was then incumbent upon the bankruptcy court to promptly determine whether the lease and agreement should be assumed or rejected. Thereafter, certainly, by insisting upon taking the benefits of the arrangement they must have understood that they could only insist upon further performance of the executory contract in the condition and as it was at the time of the bankruptcy proceedings. That the court erred in respect to the legal rights to the parties was not our fault. Private parties cannot shield themselves from the legal effect of their acts on the plea that they mis-

conceived the law. Neither can trustees in bankruptcy acting for and representing the general creditors set up any such plea. By knowingly taking any benefit under the lease and agreement the receivers and trustees must be deemed to have assumed the same with its burdens for the benefit of the estate.

See *White* v. *Griffing*, 44 Conn., 437, 449 and 450, where it was held that an assignee in insolvency proceedings had assumed a lease of the insolvent.

In *Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 142 U. S., 397, it is stated on pages 408 and 409:

> "It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations. 2 Pomeroy Eq. Juris., Sec. 965; *Chicago & Alton Railroad* v. *Chicago, etc., Coal Co.*, 79 Ill., 121. This principle is applicable here, and it results from this that, if the railway company or its receiver has been guilty of a breach of this contract, the petitioner is entitled to recover its damages, by reason of such breach, in this proceeding, unless it has in some way become estopped by the judgments of the state courts of Illinois, or by its own conduct and disclaimers in this suit."

In *Rock Island, etc., Railway* v. *Rio Grande Railroad*, 143 U. S., on pages 608 and 609, it was held that a stranger company was to be regarded as being substituted in the place of one of the parties thereto, and

entitled by reason thereof to performance from the other party. In the opinion it is said:

> "But under the circumstances of this case, a court of equity will treat the assignee in fact as the legal assignee, possessed of the rights *and charged with the obligations of the original party to the contract.*"

Had the receivers declined to assume the agreement and the bankrupt been unable to fully carry out and perform the same, then clearly the Railway Company was entitled to terminate the entire agreement and to prove all damages which would have resulted to it by reason of such breach of the entire agreement.

In re Stern, 116 Fed., 604.

It would be entitled to participate therefor in the bankrupt's estate and at the same time its obligations would be ended and the lessors would be entitled to the coal mines and leased premises. On the other hand, of course, if the receivers declined to assume the agreement, and the bankrupt had continued to perform thereunder, it could not continue to do so without recognizing the rights of the Railway Company which had attached by reason of its advances.

As the Railway Company has been deprived of these rights by reason of the arbitrary and unjust action of the receivers had under the protection of the court and the Railway Company was otherwise remediless, it is but equitable and just that the trustees in bankruptcy should be charged with the obligations of the bankrupt towards the Railway Company arising out of the verbal arrangements. It is but just that the estate of the bankrupt, for whose benefit the executory

contract of the bankrupt was taken and which has had the benefits resulting from the execution of the agreement, should be charged with the satisfaction of the obligations of the bankrupt by recognizing and allowing this claim as one which should be paid out of the assets before those of general creditors. It is a charge incurred in the administration of the bankrupt estate and therefore now entitled to preference over the claims of general creditors because it was so incurred if upon no other equitable grounds.

IX.

AS THE TERM OF THE LEASE AND AGREEMENT HAD EXPIRED JUNE 1, 1906, PENDING THE APPEAL IN THE CIRCUIT COURT OF APPEALS AND BEFORE ARGUMENT THEREON, AND AS THROUGH THE WRONGFUL ACTION OF THE BANKRUPTCY COURT IN EXERCISING ITS POWER TO WITHHOLD POSSESSION, THE BANKRUPT ESTATE HAS HAD THE ENTIRE BENEFIT OF THE LEASE AND AGREEMENT AS ADMITTED ON SUCH ARGUMENT, AND AS THE CIRCUIT COURT OF APPEALS COULD NOT, THEREFORE, THEN DIRECT ALTERNATIVE RELIEF BY REQUIRING THE TRUSTEES TO SURRENDER UP THE LEASE AND AGREEMENT, IT WAS JUST AND EQUITABLE THAT SAID COURT SHOULD DIRECT THE ALLOWANCE OF THE CLAIM OF THE RAILWAY COMPANY AS A CHARGE UPON THE BANKRUPT ESTATE, IT APPEARING FROM THE EVIDENCE THAT THE RAILWAY COMPANY PAID EACH MONTH DURING THE CONTINUANCE OF THE AGREEMENT AN AMOUNT GREATER THAN THE AMOUNT OF ITS CLAIM IN QUESTION.

As stated heretofore it was expressly admitted in the brief filed by the trustees in the Circuit Court of Ap-

peals that the receivers and trustees of the bankrupt had continued its business until the expiration of the contracts of lease. There was no question that they had not had the benefit of the performance of the contract and, had the Circuit Court of Appeals been requested to make findings of fact as contemplated by the rules of this court, which, in connection with the pleadings would constitute the entire record on appeal here, sufficient findings to cover such matters would have been made as is apparent from the opinion of the Circuit Court of Appeals. Courts frequently act upon the admissions of parties before it and the Circuit Court of Appeals was justified in acting upon admissions made before it. There was no possible controversy in respect to the salient fact that the trustees had continued to operate under the written lease and agreement until the termination thereof. It is idle to claim that the Circuit Court of Appeals was not warranted in making its decree because the record before the referee of necessity would not show that the trustees had continued operations until the expiration of the lease. Such contention can hardly be regarded as made in good faith in view of the admissions made to the Circuit Court of Appeals. It certainly may be presumed that as the receivers had continued to operate under the agreement after the filing of the intervering petition and as the bankruptcy court had declined to give intervenors any relief, that the trustees had continued long enough in possession to be held to have assumed the agreement with its burden so as to charge the estate of the bankrupt. To hold otherwise would be to hold their continued possession as a wrong legal-

ized only by the arbitrary power of the bankruptcy court.

It was, moreover, expressly admitted on the hearing before the referee (Rec., 71) that the receivers had been delivering coal to the railway company of from $50,000 to $75,000 a month and of course would have had the benefit of such amounts derived from the lease and agreement; so that to the extent they had assumed up to the hearing if not later they had derived ample benefit to require them to discharge the claim of the railway company.

Of course, the railway company is not to be prejudiced by the erroneous rulings of the bankruptcy court, but the bankrupt estate (which was being administered for the benefit of general creditors who were invoking the powers of that court, and which estate has derived benefits therefrom to which it was not justly entitled and which has received the fruits of the contract), should in justice be called upon to respond and make restitution. Upon equitable principles the only relief which could be afforded by the Circuit Court of Appeals was to require the trustees in bankruptcy in their settlements with the railway company to recognize the outstanding obligations of the Mount Carmel Coal Company and to give credit to the railway company for the amount of the advances made by it upon what would otherwise be due for the coal furnished it by the receivers, and trustees since the bankruptcy proceedings were instituted, or the amount of the advances of the railway company should be made a charge upon the bankrupt estate as that estate has

had the benefit of the entire agreement. The trustees should be required to refund out of such estate the amount of such advances and to discharge the obligations or equities which had attached to the agreement in favor of the railway company, the benefits of which agreement the bankrupt estate was not entitled to receive until such obligations had been discharged.

We suggested in our brief filed before the argument in the Circuit Court of Appeals, that if that court was uncertain as to the whether the trustees in bankruptcy had continued to operate under the lease and agreement, and had taken its benefits for the remainder of the term, it might direct a further inquiry to be made in that particular and give directions as to the adjustment of accounts as was done in the case of *Erie Railroad Co.* v. *Dial*, 140 Fed., 689, 691 and 692. The unqualified admissions made in the brief of the trustees and in the argument, however, rendered such inquiry wholly unnecessary and justified in all particulars the decree of the Court of Appeals.

The power of an appellate tribunal to give appropriate directions under the circumstances is unquestioned.

Encl. of Pl. & Pr., Vol. 1, page 488.

Estho v. *Lear*, 7 Peters, 130.

Crockett v. *Lee*, 7 Wheat., 522.

The Divina Pastora, 4 Wheat., 52.

Wiggins Ferry Co. v. *O. & M. R. Co.*, 142 U. S., 396, 413, 414, 415 and 416.

Union Central Life Ins. Co. v. *Phillips*, 41 C. C. A., 272.

Hubbard v. *Manhattan Trust Co.*, 30 C. C. A., 520, 526.

Thus in Elliott on Appellate Procedure, Section 21, it is said:

> "The general authority to review and revise necessarily includes the right to enforce the law and administer justice. In the exercise of this authority an appellate tribunal may so mold its judgment as to secure the proper relief to the parties entitled to it. The fact that a question may be presented in a particular mode does not always restrict an appellate court to a particular course; for it may, upon an inspection of the whole record, pronounce such a judgment as will secure justice to the parties. *It is inconceivable that a high court of justice, such as an appellate tribunal, may not upon an investigation of the record, so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules. The denial of this right involves the affirmation that the highest courts can not award justice, and this conclusion can not be vindicated, since the underlying and sovereign principle is that the right of appeal insures the litigants who have obeyed the substantive rules of law and conformed to the rules of procedure a judgment awarding them justice under the laws of the land. It must be true, therefore, that a high appellate tribunal may deliver and enforce a judgment that will prevent wrong and award justice to the parties entitled to it.*"

It is also well settled that if during the progress of a suit asking for equitable relief owing to a change in the situation of the parties or of the conditions of the subject-matters involved, purely equitable relief cannot be granted, the court still retains jurisdiction over the controversy and grants in lieu thereof pecuniary compensation in damages. This is illustrated in cases of specific performance, where, owing either to the default of the defendant or for any other reason, it be-

comes impossible to grant the equitable remedy, the court will retain jurisdiction of the suit and award pecuniary compensation in lieu of equitable relief.

See:

Nelson v. *Bridges*, 2 Beavan, 239.
Cathcart v. *Robinson*, 5 Peters, 264.
Taylor v. *Merchants Fire Ins. Co. of Baltimore*, 9 Howard, 390, 403.
Pomeroy's Eq. Jurisprudence, 3rd Ed., Vol. 1, Sec. 237, pages 341, 342.
Morse v. *Elmendorf*, 11 Paige, 277.
Wiswall v. *McGowan*, 2 Barb., 270, 281.
Andrews v. *Brown*, 3 Cush., 130.
Milkman v. *Ordway*, 106 Mass., 232.
Martin v. *Martin*, 24 Pac., 418.

To hold that the Circuit Court of Appeals had no power to direct the granting of relief appropriate to the premises and in view of the changed condition of the subject-matter of litigation and had no power to grant appropriate relief on account of the wrong done through the erroneous action of the bankruptcy court and due to the wrongful action of that court in withholding possession of property involved, when such court of appeals is given ample power under the bankruptcy law of supervision, and by appeal to correct the errors of the bankruptcy court committed in the administration of the bankruptcy proceedings, would be, indeed, a reflection upon the administration of justice. Can it be possible that a court charged with the equitable administration of an estate may commit error to the prejudice of innocent parties and not be obligated to make amends out of such estate?

Can it seize and hold property for administration in any judicial proceedings to the detriment of the rights therein of parties who did not initiate such proceedings but were strangers thereto?

We respectfully submit that the views adopted by the English Court of Appeals *In re Tyler, Official Receiver Ex parte*, King's Bench Division (1907), Volume 1, on pages 869 and 870, heretofore quoted by us, are more in consonance with the administration of justice, and with the first principle laid down in ~~Justiman's~~ Justinian Code:—

> "Justice is the set and constant purpose which gives to every man his due." * * * "The precepts of the law are these: to live honestly, to injure no one, and to give every man his due."

The Appellate Court had ample power to direct the lower court to rectify the wrong and see that justice was done.

The appeal should be dismissed or the decree of the Circuit Court of Appeals should be affirmed.

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GARDINER LATHROP,
Counsel.

FILED.
SEP 24 1908
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 95

J. E. HURLEY, CYRUS LELAND, Jr., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,
Appellants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COAL COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,
Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL AND BRIEF FOR APPELLEES ON SAME.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Appellees.

Chicago, September 10, 1908.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COAL COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,

Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS APPEAL.

Come now the above appellees and respectfully move the court to dismiss the above appeal upon the following grounds:—

1. The appellants have failed to comply with Clause 3 of General Order in Bankruptcy XXXVI, said appeal being had from a decree of the Circuit Court of

Appeals for the Eighth Circuit allowing a claim in favor of The Atchison, Topeka and Santa Fe Railway Company and directing its payment in full out of the assets of the bankrupt estate, and the said Circuit Court of Appeals did not, at or before the time of entering its decree, make and file a finding of the facts and its conclusions of law thereon, stated separately or otherwise.

2. That the case was not appealable to this court from said Circuit Court of Appeals, and this court is without jurisdiction in the premises.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

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J. E. HURLEY, CYRUS LELAND, Jr., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COAL COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,

Appellees.

BRIEF FOR APPELLEES ON MOTION TO DISMISS APPEAL.

STATEMENT.

The above case is an appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit reversing a decree of the District Court of the United States for the District of Kansas sitting in Bankruptcy, dismissing an intervening petition of appellees, and in which said District Court was directed to allow a claim in favor of the Railway Company as preferential.

On October 1, 1896, appellees entered into a so-called lease and agreement with one Charles J. Devlin, found on record pages 37 to 57, inclusive. By consent of the parties, this so-called lease and agreement was assigned by Devlin to the Mount Carmel Coal Company and afterwards by two subsequent agreements was extended in effect until June 1, 1906. On July 7, 1905, receivers in bankruptcy for the property of the Mount Carmel Coal Company were appointed, and that company was subsequently adjudicated a bankrupt, and the receivers were duly elected trustees in bankruptcy. This lease and agreement was the principal asset of the bankrupt. (Record, page 11.) Under the terms of the lease and agreement, the Osage Carbon Company gave the lessee the right to mine and extract coal from certain lands in Osage County, Kansas, and the Cherokee and Pittsburg Coal & Mining Company gave it similar rights for the same period in respect to lands in Crawford County, Kansas. Among other things the lessee agreed to pay certain rentals, and royalties on the coal mined, and to do certain other things as in the agreement specified in regard to opening and developing coal mines. In the 22nd article of this agreement (Record, pages 51, 52) the lessee was obligated to sell and deliver to The Atchison, Topeka and Santa Fe Railway Company of coal so mined all the coal required by it in the operation of its lines of railway in Kansas as far west as Newton, etc., at the prices fixed in said agreement, which were to be varied or adjusted according to certain conditions therein specified, in respect to wages paid miners. (See record, page 53.) The Railway Company was to pay the lessee on or before the 15th day of each month

for all coal delivered during the preceding calendar month according to the prices in the agreement stated. (Record, page 53.) In the 17th article (Record, page 49) provision was made by which the Coal Companies (the lessors) or the Railway Company might terminate the agreement for failure of the lessee to perform any of its obligations, covenants or agreements, if within thirty days after written notice of such failure and the nature thereof it did not cure such failure by performance satisfactory to the Railway Company or the lessors. In article 28 it was provided that neither the lease and agreement nor any interest therein should be assigned by the lessee without the consent of the lessors and the Railway Company given in writing by their respective Presidents. (Record, page 55.) In this connection it may be stated that the lessor Coal Companies were controlled by the Railway Company, and one of the main purposes of the so-called lease and agreement was to secure to the Railway Company an adequate supply of coal needed by it for the operation of its railways.

It further appeared that for some time prior to the bankruptcy proceedings the Mount Carmel Coal Company frequently requested the Railway Company to make advances on account of coal to be delivered under the contract in order to enable the Mount Carmel Coal Company to pay the wages of miners and continue its operations. Such advances would be made by the Railway Company and when vouchers would be presented by the Coal Company for coal subsequently furnished under the agreement, due credit would be given thereon for the advances so made by the Railway Company, and the vouchers duly receipted, the Railway Company

being allowed a discount in the nature of interest upon these advances until the same was duly credited upon vouchers for coal subsequently delivered under the agreement. This arrangement was verbal in its nature, made from time to time, and was one by which in substance the Railway Company, instead of waiting until coal had been delivered in each month and paying therefor upon the 15th day of the following month, paid in advance for the coal which the Mount Carmel Coal Company was obligated to furnish the Railway Company under the terms of the agreement. Before the institution of bankruptcy proceedings the Railway Company had advanced to the Mount Carmel Coal Company on account of coal to be furnished under the agreement about $57,304.16. The receivers in bankruptcy on July 7, 1905, took possession of the coal mines and proceeded to operate under the so-called lease and agreement by direction of the court. The Railway Company thereupon demanded of said receivers in bankruptcy that in furnishing coal under the lease and agreement and in carrying out the same, they should give it due credit for advancements theretofore made by it to the bankrupt as prepayments for coal which the lessee and its assignee would be obligated to furnish to the Railway Company while such receivers were seeking to obtain the benefits of the lease and agreement in question. The receivers in bankruptcy refused to recognize the claim of the Railway Company or the obligation of the bankrupt under the pre-existing arrangement between the bankrupt and the Railway Company. Thereupon the Railway Company and the Coal Companies, the lessors, filed in the bankruptcy proceedings, an intervening petition set-

ting up the oral arrangement between the Railway Company and the bankrupt and the amount of prepayments made by the Railway Company to the Mount Carmel Coal Company for coal to be furnished under the lease and agreement, and asked the court to direct the receivers to allow or satisfy the claim of the Railway Company for such advances or to surrender possession of the lands and properties covered by the lease and agreement upon payment to the receivers of the amount provided to be paid to the Mount Carmel Coal Company under the terms of said lease and contracts. (See record, pages 33 to 35.) In substance, as stated, the intervening petition in effect asked either that the receivers satisfy the demands of the Railway Company arising out of the modification of the written contract made with the Mount Carmel Coal Company in respect to the mode of performance so far as such modification was had prior to the bankruptcy proceedings, and the benefits of which contract were being appropriated by the receivers, and which demand was an equitable charge against the lease and agreement in favor of the Railway Company, or that the receivers be directed to surrender up such lease and agreement if they did not choose to adopt the same with the equities against the same in favor of the Railway Company. A general demurrer filed to this intervening petition was afterwards withdrawn and the receivers, and afterwards the trustees, who were substituted as parties, filed an amended answer setting up, first, a general denial of the averments in the intervening petition; second, a denial that the verbal contract set forth in the petition was a modification of the written lease or contracts, but alleged that *if* made at all it was an en-

tirely independent contract; and, third, that the verbal contract, as a modification of the written contracts would be within the Statute of Frauds of the State of Kansas and void. (Record, page 72.)

The matter was heard before the Referee in Bankruptcy on January 13, 1906. (Record, page 72.) He found, among other things, that the advances were made by the Railway Company to enable the Mount Carmel Coal Company to meet its pay rolls and were to be met by a delivery of coal under the terms of the lease. (Record, page 25.) He stated he was unable, however, to find testimony to modify the written lease, that there was no *express* oral agreement to that effect. He stated, however, that it was true that the advances were to be paid by money due the Coal Company (lessee) for coal furnished the Railway Company, and that the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Railway Company for money advanced. He then continued (Record, page 31): *"But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract."* (Record, page 31.) He thereupon made an order dismissing the intervening petiton as without equity. This order was affirmed by the District Court.

The referee, in other words, seemed to think that there was no express modification of the written lease and agreement because the parties had not, in set terms or language, expressed an intention to effectuate such a result. The referee and the lower court treated the various verbal transactions covering advancements

made as being separate and independent agreements in no wise connected with the written lease and agreement. In this they both overlooked or ignored an obvious fact which would be apparent to anyone who would put himself in the place of the contracting parties,—the important fact, that there was then in effect a contract by which the Mount Carmel Coal Company was obligated under its terms to furnish the Railway Company with its coal at prices stated or determined therein, that the Railway Company, in view of those existing obligations, instead of waiting to make its payments or perform its part of the contract upon the 15th day following each month, at the express request in each instance of the Mount Carmel Coal Company, made, as found by the referee, its payments in advance and thereby performed its part of the undertaking in the particular instances specified at a date prior to the time it was legally required so to do. To this extent and in these respects it is quite obvious that the strict manner of performance by the respective parties of some of the terms of the written contract was modified and to the extent that the Railway Company, at the request of the Mount Carmel Coal Company, performed in advance of the time it was required to under the strict terms of the agreement, to that extent, by the agreement of the parties and in those particulars, the written agreement was modified, and such modification was binding upon the receivers and trustees in bankruptcy as assignees of the Mount Carmel Coal Company. They could not lawfully appropriate to themselves the benefits of the agreement without at the same time assuming and discharging the burdens and

equities which had attached in favor of the other parties.

The receivers and trustees in bankruptcy and the bankruptcy court were, therefore, at an early stage, advised of the burdens which had attached to this contract in favor of the Railway Company, and it would be inequitable for the bankruptcy court to permit its receivers or trustees to continue to operate under the written lease and agreement and take the benefits thereof without discharging the equities or burdens which had attached thereto in favor of one of the other parties to such lease and agreement.

When the case was heard and argued in the Circuit Court of Appeals, which was after June 30, 1906, it appeared that the term of the lease and agreement had pending this appeal expired, that in the meantime the receivers and trustees in bankruptcy had obtained the full benefit of such lease and agreement. This was admitted by the attorney for the trustees during the argument in the Circuit Court of Appeals. The Circuit Court of Appeals concluded that the bankruptcy court should have sustained the intervenors' petition and surrendered to them the leased premises, or required the trustees, upon the assumption of the lease and agreement, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances; that not having done so and the lease having expired so that it could not then be directed by the court, the assets of the estate consisting in part of money received for coal delivered to the Railway Company, the court held, should be subjected to the payment of such advances as a preferential claim. The

decree of the bankruptcy court was thereupon reversed and the cause remanded with instructions to proceed according to the opinion of the Circuit Court of Appeals. (Record, page 129.)

An appeal to this court was allowed by one of the judges of the Circuit Court of Appeals, but no findings of fact or conclusions of law were made or filed in that court.

ARGUMENT.

I.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH CLAUSE 3 OF GENERAL ORDER IN BANKRUPTCY XXXVI MADE BY THIS COURT.

The appeal in question is taken from the final decision of the Circuit Court of Appeals for the Eighth Circuit allowing the claim of The Atchison, Topeka and Santa Fe Railway Company, directing its payment as a preferential claim out of the bankrupt estate. The intervening petition set up a claim in the bankruptcy proceedings in favor of the Railway Company. (*Lea* v. *Hinsley,* L. R. (1904), 2 Ch. Div., 57.)

Section 25b of the bankruptcy law provides, among other things, as follows:

> "From any final decision of a Court of Appeals allowing or rejecting a claim under this act, an appeal may be had under such rules within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:
>
> 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or
>
> 2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

No certificate was made by any justice of this court as required by the second clause above mentioned.

In order to expedite the settlement of bankrupt estates and the determination of claims in respect thereto, this court, under the authority of the above provision, provided in the second clause of General Order in Bankruptcy XXXVI that appeals to this court from the Circuit Court of Appeals or from any court of bankruptcy shall be taken within thirty days after the judgment or decree, and such provision has all the effect of a statutory provision.

Conboy v. *First National Bank of Jersey City*, 203 U. S., 141, 144.

In the third paragraph of the above General Order it is provided:

> "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts and its conclusions of law thereon, stated separately, and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree and the finding of facts and the conclusions of law."

The Circuit Court of Appeals was not requested to make any findings of fact or conclusions of law. The appeal is general, the entire record being sent up. The omission to make such findings of fact cannot be supplied by reference to the opinion of the Circuit Court of Appeals. In *Chapman* v. *Bowen*, 207 U. S., page 91, it was said, with reference to a failure to comply with Clause 3 of the above General Order:

> "No such finding of facts and conclusions of law was made in this case, nor was the court requested to make such finding. The appeal was a general appeal and the entire record was sent up. The omission cannot be supplied by reference to the opinion, as is attempted in the argument. *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S., 222, and cases cited; *Lehnen* v. *Dickson*, 148 U. S., 71, 74."

The above provision of the General Order is similar to the statutory provision governing appeals from a Territorial supreme court to this court in cases tried without a jury. The making of appropriate findings of fact and conclusions of law by the court from which the appeal is taken is a pre-requisite to the jurisdiction of this court.

Gray v. *Howe*, 108 U. S., 12.

Salina Stock Co. v. *Salina Creek Co.*, 163 U. S., 117, 118.

United States Trust Co. v. *New Mexico*, 183 U. S., 540.

For the above reasons the appeal should be dismissed.

II.

THE CASE IS NOT APPEALABLE TO THIS COURT AS THE QUESTION INVOLVED IS NOT ONE WHICH MIGHT HAVE BEEN TAKEN ON APPEAL FROM THE HIGHEST COURT OF A STATE TO THIS COURT.

Under Section 25b, subdivision 1, of the Bankruptcy Act, the case is not appealable to this court unless it appears that the question involved is one which might

have been taken on appeal or writ of error from the highest court of a state to this court.

Section 709 of the United States Revised Statutes governing appeals from the highest court of a state to this court permits the same from a final judgment or decree where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

In the intervening proceedings there was not drawn in question the validity of any statute of the United States or of any authority exercised under it, and in which the decision was against such validity, nor did such proceedings involve any right, title, privilege or immunity claimed under the Constitution or under any statute of or commission held or authority exercised under the United States and in which the decision was against such title, right, privilege or immunity "specially set up or claimed" by the trustees in bankruptcy.

Chapman v. *Bowen,* 207 U. S., 89.

The case was decided upon general equitable principles, and although the bankruptcy law was incidentally considered, yet no right, privilege, or immunity in favor of the trustees in bankruptcy was specially set up by and decided against them.

De Lamar's Nevada G. M. Co. v. *Nesbitt,* 177 U. S., 523.

Leyson v. *Davis,* 170 U. S., 37.

There was no right, title or privilege of the trustees in bankruptcy under any federal statute or authority which was specially set up or claimed by them in these proceedings and the decision of which was against any such claim.

Oxley Stave Co. v. *Butler County,* 166 U. S., 648.

Mutual Life Insurance Co. v. *McGrew,* 188 U. S., 291, 308, 309.

Capital Bank v. *Cadiz Bank,* 172 U. S., 426.

Bausman v. *Dixon,* 173 U. S., 113.

Therefore, also, as no appeal lies from the final decision of the Circuit Court of Appeals allowing the claim of the Railway Company in question, this appeal should be dismissed upon either ground.

Respectfully submitted.

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